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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

Californians for Safe and Competitive Dump Truck Transportation, Lindeman Brothers, Inc., and Yuba Trucking, Inc.,
Petitioners,

v.

Roberta E. Mendonca, Lloyd W. Aubry, Jr., James W. Van Loben Sels, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May California impose on motor carriers an anticompetitive public policy, different from that existing elsewhere in the nation, when the policy increases prices by 25%, disrupts service markedly, and directly interferes with the routing of trucks and employees in contravention of deregulation mandated by 49 U.S.C. Section 14501(c)(1)?

PARTIES TO THE PROCEEDING

Petitioners

Californians for Safe and Competitive Dump Truck Transportation, Lindeman Brothers, Inc., and Yuba Trucking, Inc. The corporate entities, Lindeman Brothers, Inc. and Yuba Trucking, Inc., have no parent companies or nonwholly owned subsidiaries.

Respondents

Roberta E. Mendonca, Lloyd W. Aubry, Jr., James W. Van Loben Sels, California Department of Transportation, California Department of Industrial Relations, California Division of Labor Standards Enforcement, California Department of Transportation, and International Brotherhood of Teamsters, AFL-CIO.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT FOR GRANTING THE WRIT 5

ARGUMENT 1
The overarching deregulatory purpose of the FAAA Act precludes California from enforcing its unusual, anticompetitive public policy on motor carriers 6

ARGUMENT 2
The decisions of this Court in Morales and of the Ninth Circuit in Federal Express, from which Congress explicitly scripted FAAA Act preemption, are inconsistent with the result reached by the Court of Appeals 12

ARGUMENT 3
The decision of the Court of Appeals erroneously adopted an amorphous preemption standard and a deficient view of legislative history 17

CONCLUSION 25

APPENDIX

Appendix A
Ninth Circuit Opinion, 8/21/98 . . . . . 1a

Appendix B
District Court Memorandum and Order on Motion to Dismiss, 2/13/97 . . . . . 18a

Appendix C
Ninth Circuit Order Denying Petition for Rehearing and Request for *En Banc* Review, 10/5/98 . . . . . 39a

Appendix D
District Court Final Judgment, 3/6/97 . . . . . 41a

Appendix E
California Labor Code 43a

Appendix F
Joint Conference Report on The Federal Aviation Administration Authorization Act of 1994 . . . . . 47a

Appendix G
Public Law on the on The Federal
Aviation Administration Authorization Act
of 1994 . . . . . 52a

TABLE OF AUTHORITIES

Cases

Abdu-Brisson v. Delta Airlines, Inc.,
128 F.3d 77 (2nd Cir. 1997) 17

Aloha Islandair, Inc. v. Tseu,
128 F.3d 1301 (9th Cir. 1997) 17

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) . . . . . *passim*

Ball, Ball & Brosamer, Inc. v. Reich,
24 F.3d 1447 (D.C. Cir. 1994) 24

Building & Construction Trades Dept., AFL-CIO v.
U.S. Dept. of Labor (Midway),
932 F.2d 985 (D.C. Cir. 1991) 24

California Division of Labor Standards Enforcement v.
Dillingham Construction, Inc.,
519 U.S. 316 (1997) 18

Central Transport, Inc. v. Michigan Public
Service Commission,
566 N.W. 2d 299 (Mich. App. 1997) *cert. denied,*
1998 U.S. LEXIS 7621 (U.S. 1998) 10

Charas v. Trans World Airlines, Inc.,
160 F. 3d 1259 (9th Cir. 1998) (*en banc*)
1998 U.S. App. LEXIS 30435 . . . . . 6, 16

Everest and Jennings v. American Motorists Ins. Co.
23 F.3d 226, 228 (9th Cir. 1994) 21

Federal Express Corp. v.
California Public Utilities Commission,
936 F.2d 1075 (9th Cir. 1991) *cert. denied,*
504 U.S. 979 (1992) . . . . . *passim*

Federal Express Corp. v.
California Public Utilities Commission,
No. C-87-4891 MHP, 1993 U.S. Dist. LEXIS
13830 (N.D. Cal. Sept. 23, 1993) 14, 15, 21

Ingersoll-Rand v. McClendon,
498 U.S. 133 (1990) 18

Kelley v. United States,
69 F.3d 1503 (10th Cir. 1995) *cert. denied,*
517 U.S. 1166 (1996) 9

L.P. Cavett Company v. U.S. Dept. of Labor,
101 F.3d 1111 (6th Cir. 1996) 23

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) . . . . . *passim*

New York Conference of Blue Cross v.
Travelers Ins. Co.,
514 U.S. 645 (1995) 18, 19

NL Industries v. Kaplan,
792 F.2d 896 (9th Cir. 1986) 21

O.G. Sansome v. Dept. of Trans.,
55 Cal.App.3d 434 (1976) 23

Statutes

U.S. Const., art. I, section 8; cl. 3 2
U.S. Const., art. VI, cl. 2 1
28 U.S.C. §1254(1) 1
28 U.S.C. §1331 4
28 U.S.C. §1337 4
28 U.S.C. §2106 1
29 U.S.C. §1144(a) 18
40 U.S.C. §276a(a) 24
49 U.S.C. §1305(a)(1) 8
49 U.S.C. §14501(c)(1) . . . . . *passim*
49 U.S.C. §14501(c)(2)-(3) 12
49 U.S.C. §41713(b)(1) 8
Federal Rule of Civil Proc. 12(b)(6) 4, 21
California Labor Code §1771 23
California Labor Code §1772 . . . . . 10, 23
California Labor Code §1770-1780 3
Del. Code tit. 29, Section 6960(b) 24
N.J. Stat. tit. 34 Section 34:11-56.26(7) 24

Other Authorities

Stephen G. Breyer Regulation and Its Reform
(Harvard Univ. Press 1982) 7

Pub. L. No. 103-305, § 601(a)(1) 8

H.R. Conf. Rep. No. 677, 103rd Cong. 2nd
Sess. (1994), reprinted in 1994
U.S.C.C.A.N. 1715 . . . . . *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 152 F.3d 1184 (9th Cir. 1998). A copy of the Opinion is included in the Appendix at Appendix A at 1a-17a. The Opinion of the District Court for the Northern District of California is published at 957 F.Supp 1121 (N.D. Cal. 1997) and is included in Appendix B at 18a-38a. The District Court ordered entry of the final judgment on March 6, 1997, which is printed in Appendix D at 41a to 43a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Opinion on August 21, 1998. On September 4, 1998, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which the United States Court of Appeals denied on October 5, 1998, 1998 (App. C at 39a-40a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. VI, cl. 2
Supremacy Clause

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

U.S. Const., art. I, section 8, cl. 3
Commerce Clause

The Congress shall have Power. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

* * * * *

Federal Authority over
Intrastate Transportation
49 U.S.C. §14501(c)(1)

(c) Motor carriers of property.

(1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

California Labor Code

Pertinent sections of the California Labor Code §§ 1771 through 1775 (Deering 1997) (in relevant part) are provided at App. E at 43a-46a.

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. Petitioners are interstate/intrastate motor carriers, a nonprofit association of motor carriers, and their customers.[2] The Respondents are several California agencies and their agents vested with the statutory authority to enforce California Labor Code §§1770-1780 (hereinafter "California's Prevailing Wage Law" or "CPWL").

CPWL requires motor carriers who provide trucking services to public works projects to pay their employee drivers an artificial wage concocted by California which is 75% higher than they regularly pay.[3] As an alternative, motor carriers are permitted to utilize independent owner-operators, an option which constricts the viability and

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[2] More specifically, Petitioners are dump truck carriers, engaged in transporting building, paving and construction materials in bulk. The majority of Petitioners' business involves public works projects.

[3] As challenged, CPWL is conspicuously different than federal regulation of public works projects and corresponding State formulas which do *not* apply to truckers like Petitioners. CPWL imposes craft specific, synthetic wage costs, steeply higher than justified by market conditions. The economic impact on Petitioner is enormous.

efficiency of carrier services and operations. Failure to comply with CPWL results in assessment of penalties and forfeiture of sums otherwise due Petitioners.

The facts are undisputed that CPWL:

- Increases motor carriers' *prices* 25%;
- Interferes with *routes* of motor carriers by requiring that employees and equipment be redirected to accommodate the severe economic impact of CPWL; and,
- Forces motor carriers to alter *services* by compelling utilization of independent owner-operators rather than employees.

On September 20, 1996, Petitioners filed a complaint seeking a declaration that CPWL is unconstitutional as preempted by the recently enacted provisions of the Federal Aviation Administration Authorization Act of 1994, codified at 49 U.S.C. Section 14501(c)(1), (hereinafter "FAAA Act.") An injunction preventing enforcement of CPWL was sought. Petitioners challenged CPWL only to the extent that it applies to transportation conducted over public highways.

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. §§ 1331 and 1337 because the case presented a federal question arising under the FAAA Act and the Supremacy Clause. Respondents filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming that the complaint failed to state a cause of action. Without any facts to support its position, the District Court granted Respondents' motions on the ground that the impact of CPWL on Petitioners was "too tenuous, remote or peripheral" to trigger preemption. App. B at 32a. The District Court entered judgment on March 5, 1997.

Petitioners filed a timely appeal with the Court of Appeals for the Ninth Circuit. On August 21, 1998, the Court of Appeals affirmed the District Court's judgment. Ignoring the facts and the unqualified declaration by Congress that it intended to ensure that "[s]ervice options will be dictated by the marketplace; not by an artificial regulatory structure" (App. F at 51a), the Panel held that the impact of CPWL was too "tenuous" to be preempted. App. A at 15a. It based this conclusion on the alleged "absence of any ***positive*** indication in the legislative history that Congress intended preemption in this [specific] area of traditional state power". App. A at 12a. Petitioner's request for *en banc* review was denied on October 5, 1998.

ARGUMENT FOR GRANTING WRIT

CPWL is nothing more than California's unusual, anticompetitive public policy which imposes bloated wage costs on motor carriers. Hiding behind the guise of traditional State power, California has avoided preemption of enforcement activity which clearly and directly raises the prices of motor carriers by 25%, disrupts service, and interferes directly with the routing of trucks and utilization of employees. Through CPWL, California substitutes its judgment and theory of competition for options otherwise "dictated by the marketplace."

Rather than conduct a balanced review of the undisputed facts, the courts below engaged in blatant, result-oriented, judicial activism, allowing California to enforce a statutory scheme which indisputably impairs the competitive vigor of motor carriers in direct contravention of the preemptive mandate of the FAAA Act.

The published decision of a Court of Appeals not only

deviates from Congressional mandate but also conflicts in principle and undermines the precedential value of the Supreme Court cases of Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) and American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); and of the Ninth Circuit cases of Federal Express Corp. v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991) *cert. denied,* 504 U.S. 979 (1992) and Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998) (*en banc*), 1998 U.S. App. LEXIS 30435. The need for judicial guidance from this Court is acute. The issue addressed herein, the scope of motor carrier deregulation, is one of first impression for this Court and of exceptional national importance and application.

ARGUMENT 1

The overarching deregulatory purpose of the FAAA Act precludes California from enforcing its unusual, anticompetitive public policy on motor carriers.

The imposition of CPWL on Petitioners frustrates the Congressional goal of economic deregulation of the trucking industry by severely interfering with the forces of competition. Although the District Court and the Court of Appeals herein acknowledged that CPWL affects Petitioners' prices, routes and services and in a sense "relates to" them, the courts avoided preemption by simply finding the connection "tenuous, remote or peripheral".

The court below did not conduct *any* probative evaluation of the facts no doubt because such an inquiry was and is contrary to the conclusion adopted. In fact, in good faith, it is impossible to state that the radical increase in price and the extraordinarily invasive service disruption imposed by

CPWL are not "*related to*" prices, routes and services. As such, the decisions below are flatly inconsistent with the law.

In plain language, Congress barred enforcement of State regulations such as CPWL as follows:

> Except as provided. . .**States may not enact or enforce a law,** regulation, or other provision having the force and effect of law **related to a price, route, or service of any motor carrier**. . . with respect to the transportation of property.

49 U.S.C. §14501(c)(1) (emphasis added).

Congress preempted State interference with regulation of motor carriers because in its opinion, such regulation by the State, specifically of the prices, routes, and services provided by motor carriers, impaired the economic health of this country.[4] Congress made this determination predicated on specific findings, including:

- [R]egulation of transportation of property by the States has . . . imposed an unreasonable burden on interstate commerce; . . . impeded the free flow of trade, traffic, and transportation of interstate commerce; and . . . placed an unreasonable cost on the American

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[4] In so doing, Congress recognized the trucking industry as structurally competitive and thus able to function efficiently in response to the competitive marketplace. "Classical regulation causes harm when applied to a structurally competitive industry". Stephen G. Breyer, Regulation And Its Reform 222 (Harvard Univ. Press 1982).

consumers . . . (Pub. L. No. 103-305, §601(a)(1); App. G at 52a.)

- State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. (H.R. Conf. Rep. No. 677, 103rd Cong. 2nd Sess. 87 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1759; App. F at 50a.)[5]

- Lifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service options will be dictated by the marketplace, and not by an artificial regulatory structure. (App. F at 51a.)

To accomplish its deregulatory objectives, Congress purposely selected "related to" language identical to the preemption provision of the Airline Deregulation Act.[6] It expressly sought to give the FAAA Act the same "broad preemption interpretation" adopted by this Court in Morales (App. F at 48a) and to confer on motor carriers the liberal freedom from State interference accorded to air carriers by the

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[5] Further, citations to this Conference Report will appear as "App. F at ___". The official citations are included in Appendix F.

[6] The preemption clause of the Airline Deregulation Act of 1978 (hereinafter referred to as "ADA") was initially codified at 49 U.S.C. Section 1305(a)(1) and is currently codified at 49 U.S.C. Section 41713(b)(1).

Ninth Circuit decision in Federal Express Corporation v. Public Utilities Commission, (9th Cir. 1991) 936 F.2d 1075, *cert. denied*, 504 U.S. 979 (1992). App. F at 50a. *See* discussion of Morales and Federal Express, *infra* at pgs. 12-15.

Congress's simple objectives are thwarted by the decision challenged by this Petition. *See*, Kelley v. United States, 69 F.3d 1503, 1508-1509 (10th Cir. 1995) *cert. denied*, 517 U.S. 1166 (1996). A balanced review of the undisputed facts measured against the plain language and no-nonsense legislative history of 49 U.S.C. Section 14501(c)(1) make the Panel's error crystal clear.

To an extent not existing elsewhere in the nation, CPWL substitutes an inflated, artificial wage mandated by the State for the wage resulting from the free play of the competitive market.[7] It injects anticompetitive, regulatory complications into the normal business decisions of motor carriers, disrupting their operations and requiring them to hire independent owner operators or to pay prevailing wages to their employees.

The contrived wage costs levied by CPWL are

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[7] As challenged by Petitioners, CPWL regulates the activities of dump truck carriers providing services on public highways, not *on the site* of public works projects. As such, CPWL is plainly different than prevailing wage requirements existing on federally-funded projects and public works in many other States, which do not apply to *off site* truck operations. *See*, discussion *infra* at pgs. 23-24.

synthetically inflated by 75% above market rates.[8] This direct meddling with costs increases consumer prices by 25% and encroaches on critical business decisions of motor carriers. The undisputed facts set forth in the Complaint establish that Petitioning dump truck carriers are forced to pass the higher costs to consumers (who understandably object to the same) or absorb such costs (impairing non-regulated operations). This economic conundrum is exacerbated by the fact that dump truck carriers, who use employees, cannot compete with carriers who engage independent owner operators exempt from CPWL.[9] As a result, to accommodate CPWL, on any given day dump truck carriers must assign some employees and equipment to private jobs and others to public works projects; or discard their employees in favor of independent owner operators as to the latter.[10] All of this "causes

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[8] The irony of CPWL is that it inflates dump truck wages to union scale, which is drastically above those actually paid by any dump truck carrier in California. Union employees do not participate as truck drivers in California's competitive dump truck industry.

[9] Cal. Lab. Code §1772; *See*, Central Transport, Inc. v. Michigan Public Service Commission, 566 N.W. 2d 299, (Mich. App. 1997) *cert. denied*, 1998 U.S. LEXIS 7621 (U.S. 1998), where the court found a state statute requiring intrastate motor carriers to utilize employees not independent contractors to be preempted by the FAAA Act because it constituted a barrier to entry and had a significate economic impact.

[10] The use of an employee driver rather than an independent contractor is an element of service, affects the routing of trucks and truck drivers, and impacts the price and quality of the service provided. If employees are utilized, the motor carrier can exercise precise control over drivers, equipment, scheduling,

significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets" in a manner and to an extent which Congress explicitly sought to prevent in enacting 49 U.S.C. Section 14501(c)(1). App. F at 50a.

If an economic impact as dramatic as a 25% increase in price is permissible or if the requirement that carriers utilize independent owner operators passes muster, certainly consumer protection statutes, State restrictions on advertising, and other State policies regulating competitive options of carriers may be implemented with impunity. To permit the same, constructively reverses Morales and Wolens and ignores the admonition of Congress in adopting the FAAA Act that the States are not to be permitted:

> to attempt to *de facto* regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

App. F at 48a.

If the decision of the Panel is permitted to stand on its reasoning, State regulatory schemes affecting motor and air carriers will be insulated from preemption.

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communication and all "service" aspects of a job. If owner operators are utilized, the motor carrier has little, if any, such control.

ARGUMENT 2

The decisions of this Court in Morales and of the Ninth Circuit in Federal Express, from which Congress explicitly scripted FAAA Act preemption, are inconsistent with the result reached by the Court of Appeals.

The FAAA Act was enacted to confer on motor carriers the same freedom from State interference as Congress had previously granted to airlines by the ADA as interpreted by this Court in Morales and by the Ninth Circuit in Federal Express. App. F at 48a, 50a. In crafting the FAAA Act, Congress purposely utilized the ADA's "related to" language in order to give the statute the "broad preemptive interpretation that had previously been adopted by this Court in Morales v. Trans World Airlines, Inc. ". App F. at 48a. Only limited, specifically identified powers over motor carrier transportation were reserved to the States. 49 U.S.C. Section 14501(c)(2)-(3); *See* App. F at 48a.

In Morales, this Court held that the "related to" language was "clearly expansive", had a "broad scope . . . and an expansive sweep" and was "deliberately expansive. . . conspicuous for its breadth." Morales, 504 U.S. at 388-389; 390 (internal citations and quotations omitted). It was from this predicate Congress selected language defining the reach and scope of the FAAA Act.

A review of this Court's decision in Morales makes clear the extensive reach of activity which Congress sought to preempt by the FAAA Act. In Morales, this Court held that seemingly innocuous State enforcement of general consumer protection statutes prohibiting deceptive airline fare advertisements was precisely the type of economic regulation

that Congress intended to preempt in deregulating the airline industry:

> Restrictions on advertising serve to increase the difficulty of discovering the lowest cost seller. . .and reduce the incentive to price competitively. . .[P]rice advertising surely "relates to" price . . ..

Morales, 504 U.S. at 388-389 (internal citations and quotations omitted).

In its simple, straightforward decision, this Court held that State enforcement of these and similar laws had a "forbidden significant effect" on rates, routes or services. *Id.* at 388. The fact that the effect was indirect did not trouble the Court nor did this Court feel compelled to search for some obscure "positive indication in the legislative history that Congress intended preemption" of the specific State action at issue, as does the Panel's opinion below. The existence of the economic impact on carrier prices, in and of itself, was sufficient to justify preemption, and this Court so held.[11]

Morales was decided by the Court on Monday, June

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[11] To be sure, not all State action was preempted:

> [W]e do not. . .set out on a road that leads to preemption of state laws against gambling and prostitution as applied to airlines. . .[S]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have preemptive effect.

Morales, *supra*, 504 U.S. at 388-389 (internal citations and quotations omitted).

1, 1992. Seven days later, this Court let stand the decision of the Ninth Circuit in Federal Express, which gave the ADA broad effect holding that State regulation of the *trucking operations* of Federal Express was unequivocally preempted by the ADA because such regulations which "bear on price" and/or "relate to service", "determine costs" and "effect price". As such, they are "protected from State intrusion" under the preemptive provision of the ADA. Federal Express, *supra*, 936 F.2d at 1078, *cert. denied*.

Federal Express sheds light on the limited range of activity reserved to the State by this Court's decision in Morales. In Federal Express, State policy affecting the motor carrier activities of an air carrier was enjoined. The economic impact was alleged to be both indirect and *de minimis*. Nonetheless, the Ninth Circuit found that challenged State regulation, an area of traditional State concern, entered "the zone Congress has forbidden the states to enter". Federal Express, *supra*, 936 F.2d at 1078. More specifically, the court enjoined as preempted all State regulation, *even that portion which related to prices indirectly* (*e.g.*, rules on claims), because such State regulation required Federal Express to comport its operations with "terms of service". An insignificant regulatory fee of .1 of 1% on truck revenues was found to be preempted.[12] In words which the Panel would have been wise to heed, these regulations bore on price and thus were State economic regulation barred by Congress:

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[12] Federal Express Corporation v. California Public Utilities Commission, No. C-87-4891 MHP, 1993 U.S. Dist. LEXIS 13830, *17 (N.D. Cal. Sept. 23, 1993). The insignificant impact of this fee pales by comparison to the dramatic impact on carrier prices imposed by CPWL's imputed wage.

> Most of the regulations challenged here are obviously economic--they bear on price. Those regulations which are not patently economic. . .relate to the terms on which the air carrier offers its services. Terms of service determine cost. To regulate them is to effect the price. The terms of service are as much protected from state intrusion as are the air carriers' rates.

Federal Express, *supra*, 936 F.2d at 1078.[13]

In Wolens, this Court reiterated the approach adopted by Morales and imbedded in Federal Express. State consumer fraud laws were challenged when applied to an airline's unilateral, retroactive changes to its frequent flyer program. The Court found such "state imposed obligations" preempted simply because "Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive state laws", noting that the ADA was designed to promote "maximum reliance on competitive market forces". Wolens, 513 U.S. at 228, 230. In reaching its conclusion, the Court cited with approval the principle that the preemptive clause of the ADA bars a State from imposing its own "public policies or

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[13] On remand from the Ninth Circuit, the District Court wrote "The court does not read the Deregulation Act to affect only those provisions that relate exclusively to airlines' rates, routes or services; such an interpretation would plainly undermine the 'broad pre-emptive purpose,' Morales [citation omitted] which motivates that statute. *Once it is determined that a regulation is at least partly economic, therefore, the preemption inquiry is ended.*" Federal Express, *supra*, 1993 U.S. Dist. LEXIS 13830 at *13 (emphasis added).

theories of competition or regulation on the operations of an air carrier." Wolens, 513 U.S. at 229, n. 5.[14]

The principles set forth in Morales and Federal Express, from which Congress scripted the FAAA Act, are uncomplicated. They echo the view of Congress that in deregulating the motor carrier industry, it "intended to promote maximum reliance on competitive market forces." Where imposition of State policy (like CPWL) frustrates this goal of economic deregulation or interferes with competition, it is barred.[15]

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[14] In Wolens, this Court did not find preempted common law contract claims which were a matter of private agreement between the parties. *Id.* at 232. The Court noted that market efficiency requires an effective means to enforce private agreements and thus held that preempting the enforcement of such agreements was inconsistent with Congressional intent to promote competitive market forces. *Id.* at 230.

[15] On November 30, 1998, one hundred days after the decision of the Panel below, these principles were affirmed *en banc* by the Ninth Circuit. In Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998) (*en banc*), 1998 U.S. App. LEXIS 30435, the court revisited the plain language and Congressional intent behind the preemption clause of the ADA ruling that proper preemption analysis must focus on whether the State laws frustrate the goal of economic deregulation by interfering with the forces of competition. Charas, *supra*, 1998 U.S. App. LEXIS 30435 at *12. The court noted that the clear and manifest purpose of Congress in enacting the ADA was "the economic deregulation of the airline industry. Specifically, the ADA was designed to promote maximum reliance on competitive market forces." *Id.* at *17 (Internal citations and quotations omitted.) The rationale and holding of Charas is flatly inconsistent with that of the Panel which is challenged herein.

ARGUMENT 3

The decision of the Court of Appeals erroneously adopted an amorphous preemption standard and a deficient view of legislative history.

The Court of Appeals' decision radically limited the scope of motor carrier deregulation. It eviscerated the competitive forces which Congress manifestly sought to encourage with respect to the transportation of property by motor carriers. While conceding that CPWL is "related to" Petitioners prices, routes and services, the Panel concluded, without factual basis, that the effect of California's anticompetitive policy was "indirect, remote and tenuous." [16] As such the Opinion establishes an amorphous and unworkable standard with dangerous implications for national ADA/FAAA Act preemption jurisprudence. There is a great need for corrective guidance from this Court.

Rather than defer to Congressional intent or the ADA

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[16] Petitioners acknowledge that not all State action is preempted by the FAAA Act. *See*, fn. 11 and fn. 14, *supra*. Several courts have determined that some State, labor-related policies (*e.g.* those barring age and disability discrimination) are not preempted by the ADA because they are "tenuously" related to prices, routes and services. Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77 (2nd Cir. 1997); Aloha Islandair Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997). However, in neither of these cases did there exist the radical, direct and dramatic economic impact on motor carrier prices and services as that which arises from CPWL. Had the Panel fairly evaluated the undisputed facts, it could not have found the effect of CPWL to be tenuous. The Panel has allowed a limited exception to swallow the rule.

preemption cases adopted by Congress, the Panel borrowed language from ERISA preemption cases to find that CPWL was tenuously related to the prices, routes and services of Petitioners.[17] Respectfully, this body of law does not stand for the proposition for which it is proffered by the Panel.

ERISA preemption prohibits State actions that "relate to any employee benefit plan." 29 U.S.C. Section 1144(a). FAAA Act preemption, patterned on this language, prohibits State actions "related to price, route or service of any motor carrier." 49 U.S.C. Section 14501(c)(1). The language intentionally adopted by Congress for its breadth is almost identical. There the similarity ends.

To facilitate ERISA, Congress preempted State action to the extent necessary to protect a static body of federal law governing administration of employee benefit plans. Ingersoll-Rand v. McClendon, 498 U.S. 133, 142 (1990). As such, Congress was concerned with the "administrative" integrity of the plans themselves, not with the direct or

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[17] In California Division of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316 (1997), this Court declined to find CPWL preempted by ERISA because CPWL merely dictated the wages, but did not affect the administration of the ERISA plan itself, "areas with which ERISA [are] expressly concerned--reporting, disclosure, fiduciary responsibility and the like." Dillingham, *supra*, 519 U.S. at 330 (internal citations and quotations omitted). Similarly in New York Conference of Blue Cross v. Travelers Insurance Company, 514 U.S. 645 (1995), the Court held that ERISA did not preempt a New York statute which required hospitals to collect certain surcharges from patients because the surcharges simply bore on the costs of ERISA plans and did not affect the uniform administration of the plans themselves. Travelers, supra, 514 U.S. at 659-660.

indirect costs of employee benefits.[18]

By contrast, Congress preempted State action related to the prices, routes and services of motor carriers in order to protect their dynamic day-to-day operations from interference by artificial State regulation; *i.e.*, to ensure that transportation companies "freely compete more efficiently" and that "service options will be dictated by the marketplace; and not by an artificial regulatory structure." App. F at 51a. Congress was particularly concerned that motor carriers be protected from artificially inflated costs imposed by State regulatory schemes.[19]

With this marked difference in "objectives" to be advanced by the two Acts, it follows necessarily that the "effect" of any State law (like CPWL) on each will be distinct. The goals which Congress sought to advance, the objects sought to be protected, and the range of State activity

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[18] "An indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself. . .Nor does the indirect influence of the surcharges preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one. It simply bears on the costs of benefits and the relative costs of competing insurance to provide them." Travelers, *supra*, 514 U.S. at 659-660.

[19] Congress specifically found that State economic regulation of motor carriers causes significant inefficiencies, increased ***costs***, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets, and that such regulation is usually designed to ensure not that prices are kept low, but that they are kept high enough to cover all ***costs*** and not so low as to be "predatory". App. F at 50a.

sought to be preempted are palpably different.

Unlike the situation existing with respect to ERISA, where costs were not a Congressional concern, as to FAAA Act preemption precisely the opposite is true. App. F at 50a. Even a modest increase in costs compelled by State policy rather than dictated by the marketplace is preempted. "Terms of service determine cost. To regulate them is to effect price. The terms of service are as much protected from state intrusion as are. . .rates." Federal Express, *supra*, 936 F2d at 1078. A State is flatly barred from imposing its own "public policies or theories of competition or regulations on the operations of. . .[a motor carrier.]" Wolens, *supra*, 513 U.S. at 229, n.5.

It simply cannot be said that the artificially induced increase in costs mandated by CPWL, which translates to an increase in consumer prices of 25%, is modest or that it does not impair, impede, distort or "relate to" the "prices" of Petitioning motor carriers in the most direct and immediate way. As noted above, the impact on the competitive options of Petitioners is enormous. Similarly, it is impossible to discount the blow leveled by CPWL when it requires motor carriers to discard employees and utilize independent owner operators. It is difficult to imagine a more invasive inroad into the services provided by motor carriers. *See* discussion *supra* at pgs. 9-11. Yet these are precisely the results the Panel's decision permits.

It strains the bounds of credulity to assume that the inflation of prices and disruption of service wrought by CPWL on these Petitioners do not "hobble" competition and destroy "reliance on competitive market forces" in the most virulent way. Wolens, *supra*, 513 U.S. at 228. By way of comparison, in Federal Express, a California mandated

increase in trucking costs of approximately .1 of 1% was held to be too much and was preempted.[20] The impact on carriers of deceptive advertising, trade practices and consumer fraud statutes unequivocally preempted by this Court in Morales and Wolens, pales by comparison to the consequences of CPWL to Petitioners.

It is exceedingly telling that the Panel's decision contains absolutely no evaluation of the undisputed facts.[21] The Panel turned a blind eye to these facts, sidestepped Morales, Federal Express and Wolens, and held that the effect of CPWL is no more than "indirect, remote and tenuous." It justified this departure by a convoluted approach to preemption jurisprudence, namely by finding that State action was not preempted because there existed an "absence of any *positive* indication in the legislative history that Congress intended preemption in this [specific] area of traditional state

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[20] Also preempted were seemingly innocuous State intrusions on motor carrier activities, *e.g.*, requirement of uniform credit rules, forms of contracts, imposition of reporting and record requirements, etc., all of which encroach on carrier operations less than CPWL. *See*, Federal Express, *supra*, No. C-87-4891 MHP, 1993 U.S. Dist. LEXIS 13830 at *17.

[21] This is egregious in that the case below was decided under Federal Rule of Civil Procedure 12(b)(6). No evidence was taken. The district court was required to take all material allegations of the Complaint as true and to construe the same in the light most favorable to Petitioners. NL Industries v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The Panel was required to review these facts *de novo*, to accept the allegations of the Complaint, and to draw all inferences in Petitioners' favor. Everest and Jennings v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994). These principles the Panel did not follow.

power". App. A at 12a.[22]

Citing an obscure discussion in the legislative history regarding ten jurisdictions which allegedly did not *regulate* intrastate prices, routes, and services of motor carriers, through typical forms, the Panel noted that seven of the ten jurisdictions (Alaska, Delaware, District of Columbia, Maine, Maryland, New Jersey, and Wisconsin)[23] have "general prevailing wage laws substantially similar to CPWL." App. A at 11a. Without checking the citations, the Panel reasoned this "portion of the legislative history constitutes indirect evidence that Congress did not intend to preempt CPWL". App. A at 11a-12a. The Panel's reliance on this supposed "indirect evidence" is misplaced.

First, it is clear that Congress did not intend to immunize any State from FAAA Act preemption simply because they did not have traditional public utilities regulation

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[22] This finding flatly disregards the instruction of the Supreme Court in Morales that the ADA preemption provision applies to laws of general applicability, not only to State laws specifically addressing the airline industry:

> Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the 'relating to' language."

Morales, *supra*, 504 U.S. at 386.

[23] The portion of the legislative history relied upon by the Panel is reprinted in the App. F at 49a-50a.

in place at that time.[24] In fact, Congress poignantly noted that it did "not intend for States to attempt to *de facto* regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority". App. F at 48a. For example, Wisconsin which was one of the ten States identified in the Congressional text cited by the Panel, has State consumer protection laws which were found preempted by this Court in Morales.

Second, the Panel is incorrect that seven of the ten States' prevailing wage laws are "substantially similar" to CPWL. In fact, CPWL is unique in several particulars. Most notably, CPWL (as challenged by Petitioners) requires prevailing wages to be paid to truck drivers,[25] whereas this is not true in a number of the States cited by the Panel below, a fact on which the Panel in its rush to judgment did not pause to reflect.[26] At least three of the cited State statutes on their

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[24] The statement in the Congressional Record that ten States do not *regulate* prices, routes and services absolutely does not mean that these States do not have laws which *relate* to prices, routes and services, preempted by the FAAA Act. To equate the term "regulate" with the phrase "related to" misreads the FAAA Act. As noted by this Court in Morales, "had the statute been designed to preempt state law in such a limited fashion, it would have forbidden the states to regulate rates, routes and services". Morales, 504 U.S. at 585.

[25] *See*, California Labor Code Sections 1771-1772; O.G. Sansome v. Dept. of Trans., 55 Cal.App.3d 434, 444 (1976) (finding CPWL applies to truck drivers).

[26] This issue has been the subject of several circuit court opinions which have restricted the Davis-Bacon Act to onsite workers not truck drivers. L.P. Cavett Company v. U.S. Dept. of

face do not require prevailing wage to be paid to truck drivers because employees not working exclusively with the physical confines of the construction site are not covered by the statutes.[27] Finally, CPWL requires a grossly inflated wage, in this case 75% higher than the going wage, a differential greater than appears to exist in any other State.[28]

Third, by equating CPWL with the federal prevailing wage law, the Davis-Bacon Act, the Panel demonstrated its misunderstanding of the challenged State activity. App. A at 7a. Petitioners do not challenge CPWL to the extent it replicates the Davis-Bacon Act for California public works projects, that is to say, to the extent that it seeks to regulate work performed *on a public works site*. Rather, the Complaint questions the application of the statute only to truck drivers traveling *off-site*.[29]

Labor, 101 F.3d 1111 (6th Cir. 1996); Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447 (D.C. Cir. 1994); Building & Construction Trades Dept., AFL-CIO v. U.S. Dept. of Labor (Midway), 932 F.2d 985 (D.C. Cir. 1991).

[27] *See*, Del. Code tit. 29, Section 6960(b); N.J. Stat. tit. 34 Section 34:11-56.26(7); 40 U.S.C. Section 276a(a).

[28] California's prevailing wage is generally based on union labor contracts not industry surveys. Cal. Code of Regs., tit. 8, Section 16200(d). Given that little if any of the transportation at issue is provided by union carriers, the so-called "prevailing" wage has no connection to that generated by market forces.

[29] More narrowly, the relief requested by Petitioners applies only to transportation conducted over public highways from non-commercial sources to public works projects, and from public works projects to other public and private sites.

The Panel's construction of "indirect evidence" of Congressional intent is gravely deficient. Had the Panel accepted the veracity of the facts and followed precedent, it would have reached the proper conclusion, to wit, as challenged by Petitioners, CPWL directly and acutely impacts the prices, routes and services of Petitioners and is thus preempted.

CONCLUSION

The Court of Appeals' decision in this case is inconsistent with the interpretation of the ADA/FAAA Act preemption clause by this Court and the Ninth Circuit, expressly adopted by Congress. The Panel's use of a result-oriented "tenuously related" standard functioning independent of the facts, establishes a seriously flawed methodology with immediate adverse impact on preemption jurisprudence. Such judicial activism and unrestricted discretion not limited by proper statutory construction or the facts is dangerous given the importance of motor carrier deregulation to Congress and the country. Supreme Court guidance is necessary and critical to prevent States and courts from eviscerating the purpose of motor carrier deregulation, namely, an unfettered competitive marketplace.

The Petition for a Writ of Certiorari should be granted. Otherwise, this Court will suffer (a) the constructive reversal of Morales and Wolens, and (b) the confusion which will arise in the courts of this land with respect to proper scope of Congress's effort to unleash this country's motor carriers from "antiquated [State] controls" that have destroyed the "efficiency" and impaired the "quality" of this nation's transportation infrastructure .

/s/_____
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APPENDIX A

FOR PUBLICATION

[Filed August 21, 1998]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION; LINDEMAN BROTHERS, INC.; YUBA TRUCKING, INC., *Plaintiffs-Appellants,*	)	**No. 97-16026**
	)	**D.C. No.**
v.	)	**CV-96-03430-MHP**
	)	**OPINION**
ROBERTA E. MENDONCA; LLOYD W. AUBRY, JR.; JAMES W. VAN LOBEN SELS; CALIFORNIA DEPARTMENT OF TRANSPORTATION; CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; CALIFORNIA DEPARTMENT OF LABOR, *Defendants-Appellees,*	)	

97-16026 *Californians v. Mendonca*

and)
)
INTERNATIONAL BROTHER-)
HOOD OF TEAMSTERS,)
AFL-CIO,)
Intervenor-Defendant-Appellee.)
_____/

Appeal from the United States District Court for the
Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
April 13, 1998--San Francisco, California

Filed August 21, 1998

Before: Joseph T. Sneed, and Stephen S. Trott,
Circuit Judges, and Evan J. Wallach,* Judge.

Opinion by Judge Sneed

SUMMARY

Labor and Employment/Compensation

The court of appeals affirmed a judgment of the district court. The court held that the Federal Aviation

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* Honorable Evan J. Wallach, Judge of the United states Court of International Trade, sitting by designation.

of California's Prevailing Wage Law (CPWL).

California law vests appellee Roberta Mendonca with authority to enforce CPWL. Under CPWL, contractors and subcontractors that are awarded public works contracts must pay their workers not less than the general prevailing rate for work of a similar character in the locality where the contracted work occurs. A contractor's failure to pay the prevailing rate can result in penalties.

Appellant Californians for Safe and Competitive Dump Truck Transportation (Dump Truck) is an association of individuals and entities operating as motor carriers in California, or using the services of motor carriers. Mendonca assessed penalties against Dump Truck for failing to pay the prevailing wage.

Dump Truck sued Mendonca for declaratory and injunctive relief. The complaint alleged that enforcement of CPWL violated the Supremacy Clause because the FAAA Act preempted the California statute. Mendonca moved to dismiss. Appellee International Brotherhood of Teamsters (IBT) moved to intervene as a defendant.

In accord with a national legislative impetus toward deregulation of the transportation industry, § 601 of the FAAA Act provides that a state may not enact or enforce a law or other provision having the force and effect of law "related to" a price, motor route, or service of any motor carrier with respect to the transportation of property.

The district court granted the IBT's motion to intervene and Mendonca's motion to dismiss. The court

concluded that CPWL was not preempted by the FAAA Act.

On appeal, Dump Truck contended that the FAAA Act preempts CPWL because it directly affects, and therefore is "related to" the prices, routes, and services of Dump Truck's motor carrier enterprises. Dump Truck asserted that CPWL required it to raise its rates for services, which were based on costs, including labor; permits; insurance; taxes; licenses; performance factors; and conditions, including prevailing wage requirements. Dump Truck also challenged the district court's ruling on IBT's motion to intervene under Fed. R. Civ. P. 24(a).

[1] State laws dealing with matters traditionally within a state's powers are not to be preempted unless Congress's intent to do so is clear and manifest. The Supreme Court has indicated that CPWL is an example of state action in a field long regulated by the states.

[2] The text of the FAAA Act offers little in the way of definition or direction as to the statute's preemptive scope. [3] Its legislative history constituted indirect evidence that Congress did not intend to preempt CPWL. [4] Recent Supreme Court cases interpreting preemption clauses instruct that state regulation in an area of traditional state power having no more than an indirect, remote, or tenuous effect on a motor carrier's prices, routes, and services is not preempted.

[5] While in a sense CPWL was "related to" Dump Truck's prices, routes and services, the effect was no more than indirect, remote, and tenuous. CPWL does not frustrate the purpose of deregulation by *acutely* interfering with the

forces of competition. Nor could it be said that CPWL falls within the field of laws regulating prices, routes, or services. CPWL is not "related to" Dump Truck's prices, routes, and services within the meaning of the FAAA Act's preemption clause.

[6] The IBT satisfied each of the elements of Rule 24(a). IBT timely sought to intervene. Its members had a significant interest in receiving the prevailing wage for their services. CPWL was the subject of Dump Truck's preemption suit. In the event Dump Truck prevailed, it would have impaired the right of IBT's members to receive the prevailing wage. Because the interests of IBT's members were potentially more narrow and parochial than the interests of the public, IBT demonstrated that representation of its interests by the named defendants might have been inadequate. The district court did not err by granting IBT intervention as of right.

COUNSEL

Ellis Ross Anderson, Anderson, Donovan & Poole, San Francisco, California, for the plaintiffs-appellants.

Miles E. Locker, Irene B. Moy, Department of Industrial Relations, San Francisco, California, for the defendants-appellees.

Mary Lynne Werlwas, Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the intervenor-defendant-appellee.

97-16026 *Californians v. Mendonca*

OPINION

SNEED, Circuit Judge:

The issue before us is whether the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501 et seq. ("FAAA Act") preempts enforcement of California's Prevailing Wage Law, Cal. Lab. Code §§ 1770-80 ("CPWL"). We hold that it does not do so.

The language and structure of the FAAA Act does not evidence a clear and manifest intent on the part of Congress to preempt the CPWL. Although CPWL is not entirely unrelated "to a price, route or service of... motor carriers," the teachings of recent Supreme Court cases make clear that a state law dealing with matters traditionally within its police powers, and having no more than an *indirect, remote, and tenuous* effect on motor carriers, are not preempted. Such is the case here. Thus, we affirm the district court's dismissal of plaintiffs' complaint.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs Californians for Safe & Competitive Dump Truck Transportation, Lindeman Brothers, Inc. and Yuba Trucking, Inc. (collectively "Dump Truck")[1] are public works

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[1] Plaintiff Californians for Safe & Competitive Dump Truck Transportation is a nonprofit association of approximately eleven individuals and entities operating as motor carriers in California or utilizing the transportation services of motor carriers. Plaintiffs Lindeman Brothers, Inc. and Yuba Trucking, Inc. are

contractors who provide transportation-related services on publicly-funded projects within California. The defendants (collectively "Mendonca") are several California agencies and their agents in whom the State of California vests the statutory authority to enforce CPWL.

Since 1937, when CPWL was enacted, California has required contractors and subcontractors who are awarded public works contracts to pay their workers "not less than the general prevailing rate . . . for work of a similar character in the locality in which the public work is performed." *See* Cal. Lab. Code § 1771.[2] Failure to pay prevailing wages results in the assessment of penalties against the contractor. *See* Cal. Lab. Code § 1775. Mendonca assessed Dump Truck various penalties after it failed to pay its workers the prevailing wage.

On September 20, 1996, Dump Truck filed suit in the district court seeking both declaratory and injunctive relief. Dump Truck claimed that enforcement of CPWL violated the Supremacy Clause because the FAAA Act preempted CPWL. Jurisdiction was based on the existence of federal questions and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.

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motor carrier enterprises incorporated in California which are engaged in the transportation of property in intrastate and interstate commerce.

[2] The CPWL essentially adopted the provisions of the 1931 Davis-Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. §§ 276a to 276a - 5, which required that wages paid on federal public works projects equal wages paid in the project's locale on similar, private construction jobs.

97-16026 *Californians v. Mendonca*

On October 18, 1996, Mendonca filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and, in late 1996, the International Brotherhood of Teamsters ("IBT") sought leave to intervene as a defendant. Dump Truck opposed both motions. The district court granted IBT's motion to intervene and, thereafter, granted Mendonca's motion to dismiss after the district court concluded that CPWL was not preempted. The district court entered final judgment, and Dump Truck timely appeals the district court's ruling on the preemption issue as well as its decision to grant IBT's motion to intervene.

II.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal under 28 U.S.C. § 1291. A district court's decision regarding preemption is reviewed de novo. *Gee v. Southwest Airlines,* 110 F.3d 1400, 1404 (9th Cir.), *cert. denied,* 118 S. Ct. 301 (1997).

III.

DISCUSSION

Part I: The District Court's Dismissal of the Complaint

Dump Truck contends that the plain meaning of the FAAA Act's preemption clause, the intent of Congress, and the Supreme Court's "broad interpretation" of the ADA's preemption clause, compel a conclusion that the FAAA Act preempts CPWL. Dump Truck therefore asserts that the district court erred by dismissing its complaint under Fed. R. Civ. P.

12(b)(6).

[1] We commence with the assumption that state laws dealing with matters traditionally within a state's police powers are not to be preempted unless Congress's intent to do so is clear and manifest. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Supreme Court has indicated that CPWL is an example of state action in a field long regulated by the states. *See California Div. of Labor Standards Enforcement v. Dillingharn Constr., Inc.*, 117 S. Ct. 832, 835, 840 (1997). Thus, the crux of this case is whether Congress exhibited a clear and manifest intent to preempt CPWL.

Nonetheless, to determine Congressional intent, we first must consult the text of the FAAA Act, as well as its structure and purpose. We are mindful of the Supreme Court's admonition that "preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

1. The Text of the FAAA Act

[2] On January 1, 1995, Section 601 of the FAAA Act became federal law. As a general matter, this section preempts a wide range of state regulation of intrastate motor carriage. It provides:

> (c) Motor carriers of property. (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of

> 2 or more States may not enact or enforce a law, regulation, or other provision *having the force and effect of law related to a price, route, or service of any motor carrier* . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1)(1997) (emphasis added). Paragraphs (2) and (3) exempt a number of types of state regulations and controls. *See* 49 U.S.C. § 14501(c)(2), (3). None of the exemptions, however, apply here. Beyond this, the text offers little else in the way of definition or direction as to the FAAA Act's preemptive scope.

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2. The Legislative History of the FAAA Act

Congress apparently regarded the preemption clause of the FAAA Act as a way of solving two major problems facing interstate commerce. First, Congress believed that across-the-board deregulation was in the public interest as well as necessary to eliminate non-uniform state regulations of motor carriers which had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtail[ed] the expansion of markets." H.R. Conf. Rep. No. 103-677, at 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

Second, by enacting a preemption provision identical to an existing provision deregulating air carriers (the Airline Deregulation Act ("ADA")), Congress sought to "even the playing field" between air carriers and motor carriers. *Id.* at 85, 1994 U.S.C.C.A.N. at 1757, 1759. This imbalance arose out of this court's decision in *Federal Express Corp. v. California Pub. Utils. Comm'n,* 936 F.2d 1075 (9th Cir. 1991).

By holding that Federal Express fit within the ADA's definition of "air carrier," this court concluded that California's intrastate economic regulations of the carrier's shipping activities were preempted. As a result, air-based shippers gained a sizeable advantage over their more regulated, ground-based shipping competitors. By preempting the states' authority to regulate motor carriers, Congress sought to balance the regulatory "inequity" produced by the ADA's preemption of the states' authority to regulate air carriers. *See* H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1759.

It is revealing to note that Congress identified forty-one jurisdictions which regulated intrastate prices, routes and services, followed by ten jurisdictions which did not regulate in these areas. *See* H.R. Conf. Rep. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1758. Of the ten jurisdictions which Congress found *did not* regulate intrastate prices, routes and services, seven of these jurisdictions had, and continue to have, general prevailing wage laws substantially similar to CPWL.[3]

[3] This portion of the legislative history constitutes

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[3] The seven jurisdictions with prevailing wage laws similar to the CPWL are: Alaska, Delaware, the District of Columbia, Maine, Maryland, New Jersey, and Wisconsin. *See, e.g.*, Alaska Stat. § 386.05.010 et seq. (Michie 1996); Del. Code Ann. tit. 29, § 6960 (1997); 40 U.S.C. § 276(a) (1994) (making the Davis-Bacon Act applicable to the District of Columbia); Me. Rev. Stat. Ann. tit. 26, § 1304 (West 1997); Md. Code Ann., State Finance and Procurement § 17-201 (1997); N.J. Stat. Ann. § 11-56.26 (West 1997); Wis. Stat. § 66.293 (West 1998).

indirect evidence that Congress did not intend to preempt CPWL. This perception is reinforced by the absence of any *positive* indication in the legislative history that Congress intended preemption in this area of traditional state power. *See Travelers,* 514 U.S. at 655.

3. Recent Cases Interpreting the "Related To" Language

[4] While this legislative history counsels against preemption in this case, we draw additional support from recent Supreme Court cases interpreting the preemptive scope of the ADA and ERISA preemption clauses. To repeat, these cases instruct that state regulation in an area of traditional state power having no more than an indirect, remote, or tenuous effect on a motor carriers' prices, routes, and services are not preempted.

The Supreme Court's first encounter with the ADA's preemption clause was *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). There the Court held that a state law may "relate to" the ADA, and therefore run afoul of the ADA's preemption clause, even though such law has only an indirect effect on the rates, routes, or services of an air carrier. *See id.* at 385-86.[4] It was acknowledged, however, that some state action may affect an air carrier's fares in "too

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[4] In *Morales,* the Court referred to the preemption test found in ERISA's preemption clause "[s]ince the relevant language of the ADA is identical. . . ." Morales, 504 U.S. at 384. The Court thus adopted ERISA's preemption test and declared that "[s]tate enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are preempted under 49 U.S.C. App. § 1305(a)(1)." *Id.*

tenuous, remote, or peripheral a manner" to have preemptive effect. *Id.* at 390 (citation omitted), Moreover, *Morales* "express[ed] no views about where it would be appropriate to draw the line." *Id.*[5]

In *American Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995), the Court again confronted the issue of where to draw the line in interpreting the ADA's preemptive scope. Although the two minority opinions in *Wolens* advocated either "minimal preemption" or "total preemption," *see id.* M 234, the majority took the "middle course" and held that state action was preempted to the extent that it imposed its substantive standards on the prices, routes, or services of an air carrier. *See id.* at 232. The majority further held that the ADA's preemption clause did not bar states from enforcing contract terms which the airline had voluntarily undertaken. *Id.* at 232-33. While adhering to its holding in *Morales,* the Court recognized that "principles seldom can be settled on the basis of one or two cases, but require a closer working out." *Id.* at 234-35 (citation omitted).

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995), a unanimous Supreme Court read the *Morales* ruling narrowly, and held that traditional state regulation having no more than an *indirect effect* on ERISA plans were not "related to" such plans within the meaning of ERISA's preemption clause. *See*

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[5] In the FAAA Act's legislative history, Congress endorsed the "broad preemption interpretation" adopted by the Court in *Morales. See* H.R. Conf. Rep. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1755.

id. at 661-62. The Court acknowledged, however, that a state law might produce "acute, albeit indirect, economic effects . . . that such a state law might indeed be preempted. . . ." *Id.* at 668.

In *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 117 S. Ct. 832 (1997), the Supreme Court confronted an ERISA preemption challenge to CPWL based on the contention that it "related to" and had a "connection with" ERISA plans because CPWL increased costs of providing certain benefits, thereby affecting the choices made by ERISA plans. *See id.* at 840. Rejecting this argument, a unanimous Court held that it "could not hold pre-empted a state law in an area of traditional state regulation based on so *tenuous* a relation" to ERISA plans. *See id.* at 842(emphasis added). In determining whether the a state law had the forbidden connection, the Court looked to

> the *objectives* of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the *effect* of the state law on ERISA plans.

Dillingham, 117 S. Ct. at 838 (citation omitted) (emphasis added).

Clearly the Court in these cases is attempting to preserve the proper and legitimate balance between federal and state authority. Of particular note is Justice Scalia's concurrence in *Dillingham.* He stressed that the Court's "first take on this statute was wrong" and that the" 'relate to' clause of the preemption provision is meant, not to set forth a *test* for preemption, but rather to identify the field in which ordinary

field pre-emption applies .... "*Id.* at 843 (emphasis in original). Justice Scalia further stated that "applying the 'relate to' provision according to its terms was.., doomed to failure, since . . . everything is related to everything else." *Id.*

4. CPWL is not "Related To" Prices, Routes or Services

It is against the backdrop of *Dillingham, Travelers,* and *Wolens* that we now confront Dump Truck's preemption argument. Dump Truck contends that the FAAA Act preempts CPWL because it directly affects, and therefore is "related to," the prices, routes, and services of Dump Truck's motor carrier enterprises. It argues that CPWL increases its prices by 25%, causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue. As proof of these assertions, Dump Truck alleges that its rates for "services" are based on: (1) costs, including cost of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, *including prevailing wage requirements.*

[5] While CPWL in a certain sense is "related to" Dump Truck's prices, routes and services, we hold that the effect is no more than indirect, remote, and tenuous. *See Dillingham,* 117 S. Ct. at 842. We do not believe that CPWL frustrates the purpose of deregulation by *acutely* interfering with the forces of competition. *See Travelers,* 514 U.S. at 668. Nor can it be said, borrowing from Justice Scalia's concurrence in *Dillingham,* that CPWL falls into the "field of laws" regulating prices, routes, or services. *See Dillingham,*

117 S. Ct. at 843.[6] Accordingly, we hold that CPWL is not "related to" Dump Truck's prices, routes, and services within the meaning of the FAAA Act's preemption clause. The FAAA Act thus does not preempt CPWL.

Part II: The Granting of IBT's Motion to Intervene

Dump Truck also contends that the district court erred by granting IBT's motion to intervene as of right because, in Dump Truck's view, IBT failed to meet the test for intervention under Fed. R. Civ. P. 24(a). We disagree.

A district court's decision concerning intervention as of right pursuant to Fed. R. Civ. P. 24(a) is reviewed de novo. *See Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). We apply a four-part test under Fed. R. Civ. P. 24(a):

> (1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; (4) the applicant's interest must be inadequately rep-

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[6] The test for ordinary "field preemption" was set forth in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 236 (test is whether Congress has declared it policy with respect to the matter on which the state asserts the right to act). To repeat, nowhere in the FAAA Act do we find any mention of Congress's intent to occupy the field of general prevailing wage laws.

resented by the parties to the action.

Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1493 (9th Cir. 1995) (citation omitted).

[6] Here, IBT satisfied each of the elements of Rule 24(a). First, it is uncontested that IBT timely sought to intervene. Second, its members had a "significant interest" in receiving the prevailing wage for their services as opposed to a substandard wage. Moreover, California's law guaranteeing prevailing wages, the CPWL, was the subject of Dump Truck's preemption suit. Third, in the event Dump Truck prevailed, it would have clearly impaired IBT's members' right to receive the prevailing wage. Fourth, because the employment interests of IBT's members were potentially more narrow and parochial than the interests of the public at large, IBT demonstrated that the representation of its interests by the named defendants-appellees may have been inadequate. *See Id.* Accordingly, the district court did not err by granting IBT intervention as of right.

IV.

CONCLUSION

The district court's judgment dismissing Dump Truck's complaint under Fed. R. Civ. P. 12(b)(6) is affirmed. Additionally, the district court's decision granting IBT's motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a) is affirmed.

AFFIRMED.

APPENDIX B

[Filed February 13, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION, et al.	)	
Plaintiffs,	)	**No. C-96-03430 MHP**
v.	)	**MEMORANDUM AND ORDER**
ROBERTA E. MENDONCA, et al.	)	
Defendants	)	

Plaintiffs Californians for Safe and Competitive Dump Truck Transportation and others brought this action against defendants Roberta E. Mendonca and other directors of certain state agencies of the State of California seeking (1) a declaration that California Labor Code sections 1770-80 ("Prevailing Wage Law") are unconstitutional as preempted by 49 U.S.C. section 14501 and as an impermissible burden on interstate commerce; and (2) an injunction preventing enforcement of the Prevailing Wage Law against plaintiffs. Now before the court is defendants' motion to dismiss plaintiffs' claims pursuant to Federal Rule of Civil Procedure

12(b) (6) for failure to state a claim. The International Brotherhood of Teamsters has moved to intervene as a defendant in this action and has filed a brief as amicus curiae in support of defendants' motion to dismiss. The court granted the motion to intervene and has reviewed the submissions of the intervenors.

Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND[1]

Plaintiff Californians for Safe and Competitive Dump Truck Transportation (CSCDTT) is an association of motor carriers operating in California, formed to improve dump truck transportation in California and to help its members resolve common problems and grievances. The two additional plaintiffs, Lindeman Brothers, Inc. and Yuba Trucking, Inc., are California corporations that provide dump trucks to move various construction materials in both intrastate and interstate commerce.

Collectively, plaintiffs brought this action against several individuals and the state agencies they represent. Defendant Roberta E. Mendonca is Director of the California Division of Labor Standards Enforcement,[2] defendant Lloyd Aubry, Jr. is Director of the California Department of Industrial Relations and defendant James W. Van Loben Sels is Director of the California Department of Transportation. Under the authority of their respective agencies, defendants regulate wages on public works projects in the State of California.

C-96-03430 *Californians v. Mendonca*

Plaintiffs provide, among other things, motor carrier services to publicly-funded projects in the state and calculate their rates for such services based on: (1) costs, including cost of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, including prevailing wage requirements.

Two statutes are involved in this action: (1) California's prevailing wage law, Labor Code §§ 1770-80 ("Prevailing Wage Law"); and (2) 49 U.S.C. § 14501 ("section 14501"). Enacted in 1937, the Prevailing Wage Law requires payment of a general prevailing wage based on wages in the "locality" for various "crafts" to persons performing public works contracts and the disclosure of certified employee payroll records to ensure compliance. See Cal. Labor Code §§ 1770, 1776. Enacted in the Federal Aviation Administration Authorization Act of 1994 ("FAAA Act"), Section 14501 establishes preemption of state economic regulation "related to a price, route, or service" of motor carriers. FAAA Act, Pub. L. No. 103-305, § 601(c), 108 Stat. 1569 (1994) (currently codified at 49 U.S.C. § 14501(c)).[3]

Defendants have notified plaintiffs that they are subject to various penalties for failing to pay prevailing wages and provide payroll records as required by the Prevailing Wage Law. Plaintiffs contend that enforcement of the Prevailing Wage Law will result in irreparable harm because compliance requires them to increase their rates by 25% for transportation services provided from non-commercial sources to public works projects, and from public works projects to other public and private sites ("disputed transportation").[4]

C-96-03430 *Californians v. Mendonca*

Plaintiffs filed this action on September 20, 1996, claiming that enforcement of the Prevailing Wage Law with respect to the disputed transportation is unconstitutional in two ways: (1) the Prevailing Wage Law constitutes an impermissible burden on interstate commerce; and (2) enforcement of the Prevailing Wage Law violates the supremacy clause because it is preempted by section 14501.

Defendants filed the instant motion to dismiss on October 18, 1996.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b) (6), a motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b) (6) motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987), cert. denied sub. nom. Wyoming Community Dev. Auth. v. Durning, 484 U.S. 944 (1987). Each ground for dismissal will be considered in turn.

C-96-03430 *Californians v. Mendonca*

DISCUSSION

Plaintiffs contend that enforcement of the Prevailing Wage Law with respect to the disputed transportation is unconstitutional on two grounds: (1) such regulation is preempted by 49 U.S.C. § 14501(c) and therefore violates the supremacy clause; and (2) such regulations place an unconstitutional burden on interstate commerce under the commerce clause. Defendants have moved to dismiss on both grounds.[5]

I. Preemption

Plaintiffs argue that 49 U.S.C. § 14501 preempts the Prevailing Wage Law because its enforcement has a direct effect on the price of the services they provide. Specifically, plaintiffs ask the court to declare the Prevailing Wage Law preempted by section 14501 and to enjoin its enforcement with respect to the disputed transportation. In response, defendants argue that the Prevailing Wage Law is not preempted by section 14501 because its provisions only indirectly affect plaintiffs' rates and prices and its legislative history does not support preemption of general wage regulation traditionally governed by state law.

Under the supremacy clause, federal law may preempt state law either by express provision, by implication, or by a conflict between federal and state law. N.Y. Conference of Blue Cross v. Travelers Ins., ___ U.S. __, 115 S.Ct. 1671, 1676 (1995) (citations omitted). An analysis of whether a state law is preempted begins with "the starting presumption that Congress does not intend to supplant state law." Id. It is "never assumed lightly that Congress has derogated state

regulation." Id. at 1677. When addressing preemption claims, "the question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137-38 (1990) (citations omitted). Furthermore, "where federal law is said to bar state action in fields of traditional state regulation," it is assumed that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Blue Cross, 115 S.Ct. at 1676 (citations omitted); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985).

California's Prevailing Wage Law encompasses two areas of law traditionally regulated by states.[6] Defendants are correct in stating that the regulation of wages is a subject of traditional state concern. See WSB Elec., Inc. v. Curry, 88 F.3d 788 (9th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3400 (1996) (explaining that this fact is "well settled"). The regulation of public works has also been recognized as an area of state concern. See Atkin v. Kansas, 191 U.S. 207, 222-23 (1903) (stating that "it belongs to the state, as the guardian and trustee for its people . . . to prescribe the conditions on which it will permit public work to be done on its behalf, or on behalf of its municipalities.").

Defendants argue that because the Prevailing Wage Law involves these areas of law, it cannot be preempted by section 14501.[7] This is a bit conclusory. To determine if section 14501 preempts California's Prevailing Wage Law, the court must first analyze the text of the federal provision, then determine congressional intent as expressed in the statute's legislative history. See Blue Cross, 115 S.Ct. at 1677

(statutory construction "begins with the text of the provision in question, [then], as need be, to the structure and purpose of the Act in which it occurs").

A. Interpreting Congressional Intent

Defendants argue that the Prevailing Wage Law is not preempted because (1) neither the plain language of section 14501 nor its legislative history support plaintiffs' contention that the Prevailing Wage Law is the type of law intended to be preempted by the statute; and (2) the Prevailing Wage Law is not sufficiently "related to" the prices and rates of plaintiffs' motor carrier services to require preemption. Plaintiffs read the legislative history of section 14501 in a different light, arguing that (1) the use of the phrase "related to" and the legislative history of section 14501 indicate that Congress intended the statute to have broad preemptive effect; and (2) the Prevailing Wage Law has a direct effect on their rates of service and therefore is sufficiently "related to" section 14501 to require preemption.

49 U.S.C. § 14501 states in relevant part:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b) (4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c) (1). This language does not, on its face,

encompass state regulation of wages such as the Prevailing Wage Law. Because it is not entirely clear that regulation of wages is "related to" motor carriers' prices, routes, or services, the court must next consider the legislative history of section 14501 to determine if it was Congress's "clear and manifest" intent that the Prevailing Wage Law be preempted. In determining intent, the regulation of labor on state-funded construction projects is deemed within the state's traditional police power which courts must presume Congress did not intend to preempt. See Minnesota Chapter of Assoc. Builders v. Minnesota Dept. of Labor, 47 F.3d 975, 979 (8th Cir. 1995) (citing Metropolitan Life, 471 U.S. at 740).

Plaintiff is correct in stating that Congress intended the preemption provision in section 14501 to be interpreted in the same manner as the preemption clause of the Airline Deregulation Act ("ADA") discussed in Morales v. Trans World Airlines, Inc., 504 U.S. 375 (1992). H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 85 (1994) (preemption provision concerning motor carriers "is identical to the preemption provision deregulating air carriers . . .and is intended to function in the exact same manner with respect to its preemptive effects."). In Morales, the Supreme Court found that the ADA preempted state enforcement of consumer protection laws governing the advertisement of airline fares, finding that the state laws unavoidably "relate[d] to" airline rates. Morales, 504 U.S. at 388. Plaintiffs contend that Morales provides an extremely broad interpretation of the phrase "relating to" that justifies giving broad preemptive effect to section 14501. In response, defendants argue that the scope of preemption in both the ADA and section 14501 is limited, and neither statute specifically refers to preemption of wage laws.

C-96-03430 *Californians v. Mendonca*

The scope of preemption under section 14501 has been specifically limited by Congress.[8] For example, in enacting the section, Congress stated that only "certain aspects of the State regulatory process should be preempted." FAAA Act § 601(a) (2). In addition, section 14501 itself provides various exceptions for state regulation of insurance, safety concerns, and other areas of state law. See 49 U.S.C. § 14501(c) (2)-(3). The statute's legislative history also undercuts plaintiffs' broad reading of the preemption clause; when discussing the background and purpose for enacting the section, Congress noted that:

> [c]urrently, 41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers .... Typical forms of regulation include entry controls, tariff filing and price regulation, and types of commodities carried. . . . The sheer diversity of [state] regulatory schemes is a huge problem for national and regional carriers' attempting to conduct a standard way of doing business. In hearings held on this issue, numerous examples have been cited in which rates for shipments within a state exceed rates for comparable distances across state lines.

H.R. Conf. Rep. at 86, 87. Defendants argue that had Congress intended to preempt state wage regulation, they would have done so in the conference report. Whether or not this is true, the legislative history of section 14501 does not establish that it was Congress's "clear and manifest" intent to preempt state wage regulation; rather, it appears that Congress intended to preempt state law that more directly affects motor carrier prices and rates, such as entry controls,

tariffs charged for transportation services and similar regulation.[9] In discussing state regulatory practices, the legislation speaks to regulatory schemes typically reserved to state transportation or commercial agencies, not regulations that generally govern many employers, including motor carriers.

Furthermore, the legislative history discloses another reason behind Congress's enactment of this section: the unequal treatment of common carriers organized as motor carriers and those organized as air carriers arising from the 9th Circuit's decision in Federal Express Corp. v. California Public Utilities Comm'n, 936 F.2d 1075 (9th Cir. 1991), cert. denied, 504 U.S. 979 (1992).[10] Defendants correctly point out that in Federal Express, the state economic regulation preempted by the ADA was clearly related to price. See Federal Express, 936 F.2d at 1078 (discussing the PUC's regulation of rates, discounts and promotional pricing, and other fees "obviously" preempted by the ADA). Defendants argue that, in contrast, the connection between section 14501 and the Prevailing Wage Law is too tenuous to trigger preemption.

B. The Scope of Section 14501's "Related To" Provision

A finding of preemption under section 14501 also turns on whether the Prevailing Wage Law is sufficiently "related to" plaintiffs' prices, routes and services. Defendants argue that the Prevailing Wage Law has only indirect effects on the prices that plaintiffs charge for their services and that therefore it is not adequately "related to" the prices, routes, or services of motor carriers so as to trigger preemption under

section 14501. In response, plaintiffs contend that the Prevailing Wage Law directly affects the prices they charge for services and is therefore "related to" price, route, and service under section 14501. Plaintiffs claim that the Prevailing Wage Law increases wage costs by 75%, which in turn increases prices by 25%; due to this increase in price, plaintiffs argue that the Prevailing Wage Law subjects them to forfeiture of all or part of their contract price, alters their price structure to absorb additional cost, forces them to use independent owner-operators instead of employees to avoid the Prevailing Wage Law's effects, requires them to redirect and reroute equipment to compensate for the additional costs imposed on them by the Prevailing Wage Law, and interferes with their California segment of operations, which in turn disrupts their interstate services. [11]

The meaning of the phrase "relate to" has been interpreted by the U.S. Supreme Court in the preemption clauses of ERISA[12] and the ADA.[13] Blue Cross, 115 S.Ct. at 1676-80 (discussing the meaning of "relate to" in the context of ERISA); Morales, 504 U.S. at 383-92 (interpreting the meaning of "relating to" in the preemption clause of the ADA).[14] State laws having a "connection with or reference to" the object of the federal statute have been deemed preempted. See Blue Cross, 115 S.Ct. at 1677; Morales, 504 U.S. at 384. It is true that ADA and ERISA preemption clauses have been broadly interpreted. See, e.g., Harris v. American Airlines, Inc., 55 F.3d 1472, 1474(9th Cir. 1995) (ADA's "related to" provision has "an expansive reach" that preempts state law, finding that in-flight conduct was sufficiently "related to" airline's services to require preemption of state law). Nevertheless, the Court recently cautioned against construing the phrase too broadly:

> [i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "really, universally, relations stop nowhere" [citation omitted]. But that, of course, would be to read Congress's words of limitation against pre-emption out of the law whenever Congress speaks to the matter with generality.

Blue Cross, 115 S.Ct. at 1677. Furthermore, "some state action may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have preemptive effect. Morales, 504 U.S. at 390 (interpreting the ADA).

Both parties discuss ERISA cases illustrating that prevailing wage laws in several states, including California, are not preempted by ERISA. See WSB Elec., 88 F.3d at 796 (finding that California's prevailing wage law did not sufficiently "relate to" ERISA plans to trigger preemption); Minnesota Chapter of Assoc. Builders, 47 F.3d at 979 (finding that "the incidental impact" on ERISA plans worked by the prevailing wage law was too remote to require preemption); Keystone Chapter, Assoc. Builders and Contractors, Inc. v. Foley, 37 F.3d 945, 956 (3rd Cir. 1994), cert. denied, 115 S.Ct. 1393 (1995) (finding Pennsylvania's prevailing wage law was not preempted because it had only "incidental and insignificant relations" to ERISA plans).

Additionally, the parties dispute the significance of a different line of ERISA cases involving preemption of state apprenticeship programs. See Dillingham Construction N.A.,

Inc. v. County of Sonoma, 57 F.3d 712, 718-19 (9th Cir. 1995), cert. granted, 116 S.Ct. 1415 (1996) (requiring payment of prevailing wages under California's prevailing wage law to employees in certain apprenticeship programs sufficiently "relates to" ERISA to require preemption); Hydrostorage v. Northern Cal. Boilermakers, 891 F.2d 719, 729-30 (9th Cir. 1989), cert. denied, 498 U.S. 822 (1990) (finding that state order requiring employer to participate in a state apprenticeship program "related to" employee benefit plan under ERISA). As defendants correctly point out, this unique line of cases is distinguishable from the present case because apprenticeship programs have been interpreted to fall within ERISA's definition of "employee welfare benefit plans," therefore presenting a clearer case in favor of preemption. See Dillingham, 57 F.3d at 718. Although the payment of prevailing wages in apprenticeship programs has been preempted by ERISA, the payment of prevailing wages outside of apprenticeship programs has never been determined to fall within ERISA's preemptive scope.

Turning to ADA cases, courts have broadly interpreted the ADA's preemption clause, finding state statutory and tort claims against air carriers preempted. See American Airlines, Inc. v. Wolens, __ U.S. __, 115 S.Ct. 817, 823-24 (1995) (state consumer fraud provision involving frequent flyer miles programs preempted); Morales, 504 U.S. at 391 (state consumer fraud law regulating airline rates advertising preempted by ADA); Harris, 55 F.3d at 1476-77 (Oregon Public Accommodations Law preempted where in-flight crew's behavior found to "relate to" services). However, the scope of ADA preemption has been limited in some areas of state regulation. See Wolens, 115 S.Ct. at 826-27 (although consumer fraud claims preempted, breach of contract claims

not preempted by ADA). This has been the case where the state law was insufficiently related to the rates, routes or services of air carriers. See Anderson v. American Airlines, 2 F.3d 590, 597-98 (5th Cir. 1993) (state claim against employer for retaliation had "too remote" an effect on air carrier service to trigger ADA preemption). These cases suggest that there are limits on the preemptive scope of both the ADA and section 14501 where the state regulation and claims made under it only indirectly affect motor carriers' prices, routes and services.

The Prevailing Wage Law can be distinguished from the types of state laws found to be preempted by the ADA:[15] (1) preemption has been found in the context of state tort regulation where the tortious conduct directly involved rates or services; and (2) the state statutes have been deemed preempted where they either made reference to or more directly related to the rates of air carriers. In the case at bar, the relationship between section 14501 and the Prevailing Wage Law appears to be far more attenuated.

Of the few cases discussing section 14501, none involve state wage laws; preemption has been found only in areas of state regulation that make reference to or are clearly related to motor carrier rates, routes or services. See Harris County Wrecker Owners for Equal Opportunity v. City of Houston, 943 F. Supp. 711, 724-725, 732 (S.D. Tex. 1996) (finding that local regulations limiting the areas where tow trucks could operate were sufficiently related to section 14501 to be preempted, but holding them to be exempt from preemption as permissible state safety regulations); Carsten v. United Parcel Service, Inc., 1996 U.S. Dist. Lexis 5798 (E.D. Cal. 1996) (section 14501 preempts California law

prohibiting preferential pricing by common carriers).

In light of the cases interpreting the meaning of "related to," it remains unclear whether the Prevailing Wage Law is sufficiently related to plaintiffs' prices to "trigger" section 14501 preemption. Anderson, 2 F.3d at 597 (state law claim's effect on services "far too remote to trigger preemption"). However, in light of the presumption against preemption in this area of traditional state concern, the court is not convinced that the Prevailing Wage Law adequately "relates to" the prices of plaintiffs' services in the way that Congress intended, thereby triggering preemption.

Although plaintiffs contend that the Prevailing Wage Law "directly impacts" the prices they charge their customers for their services, they list a rather lengthy chain of events describing how the Prevailing Wage Law increases wages, which increases their costs, which in turn, increases their prices, therefore requiring preemption under section 14501. Admittedly, any state regulation of the employer-employee relationship will have at least some effect on the operating costs of a business, which in turn affects the rates and prices charged. After all, "[a]ny wage regulation has the potential to increase costs to the employer." Minnesota Chapter of Assoc. Builders, 47 F.3d at 979. However, in this case, the Prevailing Wage Law's effect, as identified by plaintiffs, appears "too tenuous, remote, or peripheral" to trigger preemption. Morales, 112 S.Ct. at 2040.

Moreover, both the legislative history and the language of section 14501 suggests Congress did not intend to preempt all state laws that raise the operation costs of motor carrier businesses. For example, state regulation of insurance and

safety requirements undoubtedly affects the rates and prices charged by motor carriers, but is not preempted by section 14501. In addition, Congress sought to prevent de facto state regulation of motor carrier prices, routes and services by enacting section 14501. H.R. Conf. Rep. at 84. As defendants point out, because the Prevailing Wage Law applies to all employers involved in public works, the fifty year-old Prevailing Wage Law cannot be construed as the state's de facto attempt to regulate motor carriers as prohibited by section 14501.

Preemption of the Prevailing Wage Law is unsupported by the legislative history of section 14501 and the tenuous connection between the Prevailing Wage Law and motor carrier's prices, routes and services. During oral argument, plaintiffs urged the court find preemption in an area of state law Congress did not clearly intend to preempt. The court agrees with defendants that plaintiffs' interpretation of section 14501's knows no bounds, and leads the court down a dangerously slippery slope. Permitting preemption in this case would overextend the meaning of the "relate to" language of section 14501, while expanding the scope of preemption to areas of traditional state control where Congress has not expressed its "clear and manifest" intent to preempt.

II. Interstate Commerce

Because neither the parties nor amicus curiae have adequately briefed this issue, the court does not reach the interstate commerce claim raised in plaintiffs' complaint and briefly mentioned in defendants' motion to dismiss.

C-96-03430 *Californians v. Mendonca*

CONCLUSION

This court finds that 49 U.S.C. § 14501 does not preempt California's prevailing wage law, Labor Code §§ 1770-80. For the foregoing reasons, IT IS HEREBY ORDERED that defendants' motion to dismiss is GRANTED IN PART AND DENIED IN PART without prejudice. Defendants' motion is GRANTED on supremacy clause grounds, and DENIED without prejudice on commerce clause grounds.

IT IS SO ORDERED.

Dated: 2/4/97 /S/_____
MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. All facts are taken from plaintiffs' complaint unless otherwise indicated.

2. In their complaint, plaintiffs incorrectly identified Roberta Mendonca as Commissioner of the California Department of Labor. The proper identification is Director of the California Division of Labor Standards Enforcement.

3. Section 14501 has a confusing history: the FAAA Act

placed this preemption clause at 49 U.S.C. § 11501, but this section was repealed by the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 107 Stat. 803 (1995) ("ICC Act"). The ICC Act recodified the preemption provision in section 11501 as new section 14501. The language is identical and clearly reaffirms Congress' intent to preempt state laws relating to the prices of motor carriers. See Carsten v. United Parcel Service, Inc., 1996 U.S. Dist. Lexis 5798, *13-*14 (E.D. Cal. 1996) (discussing this legislative history).

4. Plaintiffs do not dispute enforcement of the prevailing wage law to services provided wholly within the physical limits of public works projects, or from commercial sources to public works projects.

5. Although defendants originally argued that plaintiffs' complaint should be dismissed on both preemption and interstate commerce grounds, the latter argument fades over the course of the motions, and has virtually disappeared in defendants' reply brief. Similarly, the amicus brief submitted by the International Brotherhood of Teamsters does not even mention the interstate commerce argument. Accordingly, the court does not resolve this issue at this time.

6. The parties dispute whether the Prevailing Wage Law should be considered a "minimum wage law" or an economic regulation akin to price control that interferes with market forces. It appears the argument bears on whether the Prevailing Wage Law should be considered the type of regulation that is the "subject of traditional state concern." Amicus counsel aptly notes, and the court agrees, that this battle is a purely semantic one, because "minimum and other

wage laws" fall within states' "broad authority under their police powers to regulate the employment relationship. . . ." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (emphasis added).

7. Defendants also argue that because the Prevailing Wage Law only applies to those employed in public works projects for the state, the Prevailing Wage Law is an exercise of the state's "proprietary" power, not an exercise of its "regulatory" powers. As a result, defendants claim that the Prevailing Wage Law does not "regulate" the prices, routes, or services of motor carriers and is therefore not preempted by section 14501. In response, plaintiffs provide recent cases where courts have characterized prevailing wage laws as regulatory in nature. Amicus counsel urge the court to disregard this line of argument because it has not been fully briefed by either party. The court agrees with amicus counsel and does not consider this argument in determining whether the Prevailing Wage Law is preempted.

8. Section 14501 provides several exceptions that permit continued state regulation of certain standard transportation practices (such as bills of lading and cargo credit rules), as well as certain safety and insurance regulations. See 49 U.S.C. § 14905(c) (2)-(3). Because none of these exceptions directly applies to the issues in this action and the parties have not raised their applicability, it is not necessary for the court to discuss them.

9. Plaintiffs argue that the Prevailing Wage Law is a form of entry and price control imposed on motor carriers. Plaintiffs fail to explain this somewhat strained analogy; accordingly, the court does not address this argument.

C-96-03430 *Californians v. Mendonca*

10. In this case, the 9th Circuit ruled that intrastate economic regulations for motor carriers did not apply to Federal Express because such regulations were preempted by the Airline Deregulation Act of 1978. 936 F.2d at 1078.

11. During oral argument, plaintiffs implied that preemption under section 14501 should be governed, in part, by the percentage of price comprised of wages. At the hearing, plaintiffs stated that wages constituted 33% of the eventual price charged by motor carriers, while insurance and fuel represented 4% and 8%, respectively. Plaintiffs argued that because wages constituted one-third of price, the prevailing wage law "relates to" price and is therefore preempted. The court is not willing to step down plaintiffs' slippery slope. As discussed during oral argument, if preemption was based on percentages of price, then numerous areas of state regulation would be preempted based solely on their percentage effect on motor carrier prices. Finding preemption on the basis of percentages would ignore the legislative history of section 14501 and disregard the Supreme Court's requirement of "clear and manifest" Congressional intent to preempt.

12. ERISA's preemption clause provides that "all state laws insofar as they . . . relate to any employee benefit plan" are preempted by ERISA. 29 U.S.C. § 1144(a).

13. The Airline Deregulation Act includes a preemption provision prohibiting States from enforcing any law "relating to rates, routes, or services" of any air carrier. 49 U.S.C. § 41713 (b) (1).

14. The parties dispute whether ERISA cases may be used as precedent in this action. While it is true that Congress

intended section 14501 to provide the same preemptive effect as the ADA, it is not necessary to exclude ERISA cases in construing section 14501's preemption clause. Defendants correctly note that the Court has adopted the same standard for both ERISA and the ADA where the interpretation of the phrase "relate/relating to" is concerned. See Morales, 504 U.S. at 384 ("[s]ince the relevant language of the ADA is identical [to ERISA's preemption clause], we think it appropriate to adopt the same standard here"). Therefore it is appropriate to use both ADA and ERISA cases in determining the scope of the "related to" provision in section 14501.

15. During oral argument, plaintiffs were unable to name any cases where the ADA preempted wage laws specifically. Instead, plaintiffs referred the court to two district court cases that were not cited in their opposition motion: Marlow v. AMR Services Corp., 870 F. Supp. 295 (D. Hawai'i 1994) (jetbridge maintenance employee's claim under whistleblower statute preempted by ADA where he alleged he was fired for raising safety concerns) and Abdu-Brisson v. Delta Air Lines, Inc., 927 F. Supp. 109 (S.D.N.Y. 1996) (pilots' age discrimination claim preempted by ADA). These cases are clearly distinguishable from the present case because neither involve the preemption of a generally applicable wage law.

APPENDIX C

[Filed October 5, 1998]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION, LINDEMAN BROTHERS, INC.; YUBA TRUCKING, INC.,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 97-16026 DC No. CV-96-03430 MHP
ROBERTA E. MENDONCA; LLOYD W. AUBRY, JR.; JAMES W. VAN LOBEN SELS; CALIFORNIA DEPARTMENT OF TRANSPORTATION; CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; CALIFORNIA DEPARTMENT OF LABOR, et al.	)	**ORDER**
Defendants-Appellees,	)	
and	)	

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,
Intervenor-Defendant-Appellee.

Before: SNEED, and TROTT, Circuit Judges,
WALLACH,* Judge.

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

*Honorable Evan J. Wallach, Judge of the United States Court of International Trade, sitting by designation.

APPENDIX D

**IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE
NORTHERN DISTRICT
OF CALIFORNIA**

[Filed March 6, 1997]

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION, LINDEMAN BROTHERS, INC.; YUBA TRUCKING, INC.,	)
Plaintiffs	)
v.	) Case No. C 96-03430 MHP
ROBERTA E. MENDONCA; Chief of the California Division of Labor Standards Enforcement; LLOYD W. AUBRY, JR.; Director of Department of Industrial Relations for the State of California; JAMES W. VAN LOBEN SELS, Director of Department of Transportation for the State of California; CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS;	) JUDGMENT

CALIFORNIA DIVISION OF)
LABOR STANDARDS)
ENFORCEMENT; and)
CALIFORNIA DEPARTMENT)
OF TRANSPORTATION,)
)
Defendants.)
)
and INTERNATIONAL)
BROTHERHOOD OF)
TEAMSTERS AFL-CIO,)
Defendants-In-Intervention)
_____/

The Court, on February 13, 1997, Honorable Marilyn Hall Patel, District Judge presiding, entered a Memorandum and Order which granted in part and denied in part Defendants' Motion To Dismiss. Plaintiffs now have filed an Amended Complaint which strikes any independent cause of action under the Commerce Clause. Thus, the February 3, 1997 Memorandum and Order on the Motion To Dismiss is dispositive of all claims and a final judgment in Defendants' favor is appropriate.

IT IS ORDERED AND ADJUDGED AND DECREED that Plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs.

Dated: March 5, 1997 /s/_____
JUDGE
MARLYN HALL PATEL

APPENDIX E

CALIFORNIA LABOR CODE

Cal. Lab. Code § 1771 (Deering 1997)

§ 1771. Requirement of prevailing local rate for work under contract

Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

Cal. Lab. Code § 1772 (Deering 1997)

§ 1772. Workers deemed employed upon public work

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

Cal. Lab. Code § 1773 (Deering 1997)

§ 1773. Ascertainment of prevailing rate; Data considered

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the

director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

Cal. Lab. Code § 1775 (Deering 1997) (in part)

§ 1775. (Second of two; Operative until January 1, 2003) Forfeiture for paying less than prevailing rate; Rights of workers; Stipulation in contract; Action for recovery by ~~Di~~vision of Labor Standards Enforcement

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($ 50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be

paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract, a stipulation that this section will be complied with.

APPENDIX F

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

103d Congress 2d Session H.R. CONFERENCE REPORT Report 103-677

Federal Aviation Administration
Authorization Act of 1994
August 5, 1994. Ordered to be printed.

• • •

The central purpose of this legislation is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes and services as that originally contained in Section 105(a), 49 U.S.C. App. 1305(a)(1), of the Federal Aviation Act.

However, Congress has recently enacted a recodification of certain subtitles of Title 49. This recodification has changed the language used in the original section 105. For clarity and consistency, we will follow the recodification language in amendments to both the Interstate Commerce Act and Federal Aviation Act. In substituting the world "related" for the prior word "relating" and the word "price" for the word "rates" we are intending no substantive

change to the previously enacted preemption provision in Section 105 of the Federal Aviation Act and do not intend to impair the applicability of prior judicial case law interpreting these provisions. In particular, the conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. TransWorld Airlines, Inc.*, 504 U.S. ____, 199 L.Ed. 157, 112 S.Ct. 2031 (1992).

• • •

Thus, the Conferees have used the term "price, route and service" rather than "rate, route and service" in both the Aviation subtitle and the Motor Carrier subtitle. The intention in using the identical term "price" in both areas is to create uniformity in the preemptive language and to create consistency with the earlier preemption provision. The use of this term is not intended to alter any meaning or affect any judicial interpretation.
H.R. Conf. Rep. No. 103-677, 103rd Cong. 2nd Sess. 83 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1755.

The conferees do not intend the regulatory authority which the State may continue to exercise (partially identified in section 41713(b) and under section 11501(h)) to be used as a guise for continued economic regulation as it relates to prices, routes or services. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for States to attempt to *de facto* regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

H.R. Conf. Rep. No. 103-677, 103rd Cong. 2nd Sess. 84 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1756.

Subsection (c) of Section 601 preempts State regulation of prices, routes and services of motor carriers by adding a new subsection (h) to section 11501 of Title 49, United States Code. The preemption provision, new subsection (h)(1), is identical to the preemption provision deregulating air carriers and carriers affiliated with a direct air carrier through common controlling ownership and is intended to function in the exact same manner with respect to its preemptive effects. The intention is to create a completely level playing field between air carriers and carriers affiliated with a direct air carrier through common controlling ownership on the one hand and motor carriers on the other.
H.R. Conf. Rep. No. 103-677, 103rd Cong. 2nd Sess. 85 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1757.

Currently, 41 jurisdictions regulate, in varying degrees, intrastate prices, routes of motor carriers. The jurisdictions which do not regulate are: Alaska, Arizona, Delaware, District of Columbia, Florida, Maine, Maryland, New Jersey, Vermont and Wisconsin.

Typical forms of regulation include entry controls, tariff filing and price regulation, and types of commodities carried. Not all 41 States regulate each of these aspects nor do they all regulate them in the same manner or to the same degree.

Entry controls at the State level vary from liberal to strict. Strict entry controls often serve to protect carriers, while restricting new applicants from directly competing for any given route and type of trucking business. About 26 States strictly regulate trucking [* 87, 1759] prices. Such

regulation is usually designed to ensure not that prices are kept low, but that they are kept high enough to cover all costs and are not so low as to be "predatory". Price regulation also involves filing of tariffs and long intervals for approval to change prices. A company which wants to change its prices often must go through a costly and lengthy hearing proceeding in each State in which it operates.
H.R. Conf. Rep. No. 103-677, 103rd Cong. 2nd Sess. 86, 87, reprinted in 1994 U.S.C.C.A.N. 1715, 1758, 1759.

In light of the inequity created by the 9th Circuit Court Decision, California enacted legislation in October of 1993, which extended the exemption enjoyed by Federal Express as a result of its court victory to its competitors that are motor carriers affiliated with direct air carriers.

• • •

Despite the movement toward deregulation by some individual states, the conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. According to Department of Transportation estimates, preemption of State economic regulation could eventually yield $3-8 billion per year in savings. Other estimates put the savings as high as $5-12 billion. The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business. In hearings held on this issue, numerous examples have been cited in which rates for shipments within a state exceed rates for comparable distances across state lines. In the small package express business, companies frequently ship goods

across state lines and back into [* 88, 1760] the state of origin to avoid the higher rates for purely intrastate shipment. Lifting of these antiquated controls will permit our transportation companies to freely compete more efficiently and provide quality service to their customers. Service options will be dictated by the marketplace; and not by an artificial regulatory structure.

H.R. Conf. Rep. No. 103-677, 103rd Cong. 2nd Sess. 87, 88 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1759, 1760.

APPENDIX G

PUBLIC LAW--FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT OF 1994, Section 601(a)

TITLE VI–INTRASTATE TRANSPORTATION OF PROPERTY

§ 601. Preemption of intrastate transportation of property

(a) Findings.--Congress finds and declares that--

(1) the regulation of intrastate transportation of property by the States has--

(A) imposed an unreasonable burden on interstate commerce;

(B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and

(C) placed an unreasonable cost on the American consumers; and

(2) certain aspects of the State regulatory process should be preempted.

103 P.L. 304; 108 Stat. 1569; 1994 Enacted H.R. 2739 (in part).

Supreme Court, U.S.
FILED
MAR 5 1999
CLERK

No. 98-1077

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION, *et al.*,
Petitioners,
v.
ROBERTA E. MENDONCA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1), preempt California's prevailing wage law insofar as the state law requires that motor carriers, like all other employers, must pay prevailing wages to employees on state public works projects?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	4
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Abdu-Brisson v. Delta Air Lines, 128 F.3d 77 (2d Cir. 1997) 5

Aloha Islandair, Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997) 5

American Airlines v. Wolens, 513 U.S. 219 (1995) .. 9, 10, 11, 12

Atkin v. Kansas, 191 U.S. 207 (1903) 7

California Division of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316 (1997) ..... *passim*

Central Transport, Inc. v. Michigan Public Service Commission, 566 N.W.2d 299 (Mich. App. 1997), *cert. denied*, 119 S. Ct. 544 (1998) 5, 11

Charas v. TWA, 160 F.3d 1259 (9th Cir. 1998) 5

De Buono v. NYSA-ILA Medical & Clinical Services Fund, 117 S. Ct. 1747 (1997) 9

Federal Express Corp. v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992) 5, 11

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 6

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 9, 10, 11, 12

New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) .. *passim*

O.G. Sansone Co. v. Department of Transportation, 55 Cal. App. 3d 434, 127 Cal. Rptr. 799 (1976) 2

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) 7

FEDERAL STATUTES

40 U.S.C. § 276a 1

49 U.S.C.

§ 13102(12) 2

§ 14501(c)(1) ..... *passim*

Federal Aviation Administration Authorization Act of 1994, 108 Stat. 1569 (1994)

§ 601(a) 10

§ 601(a)(1)(B), (C) 11

TABLE OF AUTHORITIES—Continued

STATE STATUTES	Page
California Labor Code	
§ 1771	2
§ 1772	2
§ 1774	2
LEGISLATIVE MATERIALS	
H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 86 (1994), reprinted in 1994 U.S.C.C.A.N. 1676	10
Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes and Services, Hearing Before the Subcommittee on Surface Transportation of the Committee on Public Works and Transportation, House of Representatives, 103d Cong., 2d Sess. (1994)	11

IN THE

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OCTOBER TERM, 1998

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

STATEMENT

1. As explained in *California Division of Labor Standards Enforcement v. Dillingham Construction,* 519 U.S. 316 (1997):

> Since 1931, the Davis-Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. §§ 276a to 276a-5, has required that wages paid on federal public works projects equal wages paid in the project's locale on similar, private construction jobs. California, in 1937, adopted a similar statute, which requires contractors who are awarded public works projects to pay their workers "not less than the general prevailing rate of per diem wages for work of a similar character in the

> locality in which the public work is performed." [*Id.* at 319, quoting Cal. Labor Code § 1771.]

For purposes of California's prevailing wage law, "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed on public work." Cal. Labor Code § 1772. They must be paid by "[t]he contractor to whom the project is awarded, and any subcontractor under him, . . . not less than . . . prevailing rates of wages." Cal. Labor Code § 1774.

Contractors and subcontractors who are "motor carriers" [1] for purposes of certain federal laws may perform work on California public works contracts and, if they do, are, like other types of contractors and subcontractors, subject to the state prevailing wage law. *See, e.g., O.G. Sansone Co. v. Department of Transportation,* 55 Cal. App.3d 434, 127 Cal.Rptr. 799 (1976).

2. Petitioners, "motor carrier" contractors who perform work on California public construction projects (hereafter "carriers"), filed suit in the District Court against state officials and agencies contending that the state prevailing wage law is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAA Act"), 49 U.S.C. § 14501(c)(1), insofar as that state law applies to "motor carriers" who undertake state public works contracts.[2]

The FAAA Act was adopted, in part, to preempt certain state regulation of intrastate transportation. The Act provides in that regard that:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or

---

[1] "The term 'motor carrier' means a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(12).

[2] The International Brotherhood of Teamsters, AFL-CIO, was granted leave to intervene as a defendant. Pet. App. 16a-17a.

> enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property. [49 U.S.C. § 14501(c)(1).]

The carriers alleged that the prevailing wage requirement raises the labor costs of motor carriers when they perform state contracts and therefore leads the carriers to raise their prices on those projects (or to seek to avoid the prevailing wage requirement by using independent contractors instead of employees to operate equipment). Pet.App. 15a. Petitioners asserted that because the prevailing wage law has an economic effect on motor carrier operations, it is a state law "related to a price, route or service of any motor carrier" (49 U.S.C. § 14501 (c)(1)), and consequently is preempted by the FAAA Act.

3. The District Court granted defendants' motion to dismiss. The District Court reasoned that a prevailing wage law is a form of traditional state regulation that should not be held preempted unless "that was the clear and manifest purpose of Congress." Pet.App. 23a (quoting *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). The District Court concluded that Congress' purpose in adopting the FAAA Act was to preempt state regulation of the trucking industry, "such as entry controls, tariffs charged for transportation services, and similar regulation." Pet.App. 26a-27a. "Permitting preemption in this case," the District Court stated, "would overextend the meaning of the 'relate to' language of section 14501" and "lead the court down a dangerous slippery slope" by "expanding the scope of preemption to areas of traditional state control where Congress has not expressed a 'clear and manifest' intent to preempt." Pet.App. 33a.

4. The Court of Appeals affirmed. The unanimous panel, per Judge Sneed, also proceeded from the starting point that the prevailing wage law concerns "matters traditionally within a state's police powers" and therefore should not be held preempted "unless Congress' intent to do so is clear and manifest." Pet.App. 9a. The Court reasoned that the language of the FAAA Act, which preempts state laws "*related to* the price, route or service of any motor carrier" (emphasis supplied) is broad, but that breadth ultimately could not be dispositive because " 'everything is related to everything else.' " Pet.App. 15a (quoting *Dillingham*, 519 U.S. at 335 (Scalia, J., dissenting)).

The Court of Appeals therefore examined Congress' objective in adopting the FAAA Act and found no indication that Congress "intended preemption in this area of traditional state power." Pet.App. 12a. Because the prevailing wage law does not "frustrate the purpose of deregulation by acutely interfering with the forces of competition," and does not "fall[] into the field of laws regulating prices, routes or services," the Court concluded that Congress had not shown a "clear and manifest" intent to preempt it. Pet.App. 15a (emphasis, quotation marks omitted).

Petitioners' suggestion for a rehearing *en banc* was denied, with no judge requesting a vote. Pet.App. 40a.

ARGUMENT

The decision below does not merit review under any of this Court's usual criteria.

First, there is no conflict as to the question presented. Petitioners do not cite, and we are unaware of, any decision holding that the FAAA Act preempts a state prevailing wage law. Petitioners also do not even cite, and we are also unaware of, any decision holding that the FAAA

Act preempts *any* state wage law, even one that applies broadly to employees who are *not* working on public contracts, as to whom the state's interest might arguably be lesser.

The only remotely analogous cases cited in the Petition hold instead that the Airline Deregulation Act (which contains a preemption provision analogous to the provision in the FAAA Act) does *not* preempt, as applied to airlines, generally applicable state anti-discrimination laws, even though such state laws could have some indirect effect on the prices charged by airlines. *See* Petition at 17 n. 16 (citing *Abdu-Brisson v. Delta Air Lines*, 128 F.3d 77 (2d Cir. 1997) and *Aloha Islandair, Inc. v. Tseu*, 128 F.3d 1301 (9th Cir. 1997)). *See also Charas v. TWA*, 160 F.3d 1259 (9th Cir. 1998) (en banc) (Airline Deregulation Act does *not* preempt ordinary state law tort claims for personal injuries against airlines).[3]

Second, the Court of Appeals' decision does not announce new legal principles applicable to a broad class of preemption cases. It merely repeats and applies to a specific context preemption principles that are well-settled.

This Court has "oft-repeated" that "the purpose of Congress is the ultimate touchstone" in any preemption case

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[3] *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992) and *Central Transport, Inc. v. Michigan Public Service Commission*, 566 N.W.2d 299 (Mich. App. 1997), *cert. denied*, 119 S.Ct. 544 (1998), which are cited and relied upon in the Petition, involved state laws directed particularly to regulating the transportation industry, *i.e.* laws within the class of legislation to which the FAAA Act's premption provision was unquestionably targeted. They provide little guidance on the extent to which the FAAA Act preempts generally applicable state laws, or employee protective laws in particular, and are certainly not in conflict with the decision below.

(*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citations and quotations omitted)), and that

> [a]s is always the case in our preemption jurisprudence, where "federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.'" [*Dillingham*, 519 U.S. at 325 (emphasis supplied) (quoting *Travelers*, 514 U.S. at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).]

Dillingham, indeed, rejected a claim that part of the *same* California prevailing wage law at issue here is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), leaving no doubt that the prevailing wage law is a form of traditional state regulation entitled, as the Court of Appeals recognized, to a strong presumption against preemption.

Petitioners describe the outcome of the Court of Appeals' application of settled preemption principles to this particular case as the product of "blatant, result-oriented, judicial activism" (Petition at 5), but that seems a poor label for a decision upholding a traditional state labor standards law of 60 years standing.

Third, notwithstanding the considerable hyperbole in the Petition, the Ninth Circuit's holding will not "eviscerat[e] . . . motor carrier deregulation." Petition at 17.

To be sure, the state prevailing wage law *does* prevent public works contractors and subcontractors, including motor carriers, from competing with one another for state contracts to the extent that they cannot cut employee wages below a prescribed level. And this limitation may well increase the prices the state ultimately pays on such

contracts, including for the services of motor carriers. But the state—which in this case is the ultimate customer—is willing to pay those prices.[4]

This Court recognized long ago that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon it will permit public work to be done on its behalf, or on behalf of its municipalities" (*Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903)) and that the employees of public works contractors "in a substantial if informal sense, [are] working for the [government]." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 211 n.7 (1983). Interfering with California's freedom to contract for its *own* public works projects on the terms it chooses does not have anything to do with deregulation. The goal of deregulation is to benefit consumer choice, and in this case the ultimate consumer simply wishes to do business only with contractors who agree not to pay substandard wages to the employees who work on the contract.[5]

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[4] The Petition repeatedly exaggerates the effect of the prevailing wage law on motor carriers. The law does not "requir[e] that employees and equipment be redirected" (Petition at 4) or "compel[] utilization of independent owner-operators rather than employees" (*id.*) or require "extraordinarily invasive service disruption." *Id.* at 6. It simply requires that, like other contractors and subcontractors who choose to work on state public works contracts, contractors and subcontractors who are motor carriers must pay their employees at least prevailing wages for their work on those contracts.

[5] Petitioners make much of the fact that California's prevailing wage law covers motor carriers hauling materials to and from public projects, rather than only transportation confined to the project site. It is hard to see what possible relevance this distinction could have to FAAA Act preemption. The salient point is not where the hauling occurs but that the prevailing wage law covers only contractors and subcontractors working on state public works *contracts*,

Finally, petitioners' argument that the prevailing wage law is preempted by the FAAA Act depends upon reasoning that this Court already has rejected.

a. Petitioners submit that because the prevailing wage law as a practical matter *affects* the prices (and perhaps routes and services) of motor carriers who undertake public works projects, it is *necessarily* a "law . . . *related to* a price, route, or service" (emphasis supplied) of a motor carrier within the meaning of the FAAA Act. But this Court rejected a structurally identical linguistic argument in *Travelers*, holding that a state law with an indirect, purely economic impact on the benefit decisions made by employee benefit plans does not necessarily "relate to" those plans within the meaning of ERISA's preemption provision.

The state law at issue in *Travelers* imposed a 24 percent surcharge on hospital bills for patients with private medical insurance other than Blue Cross and Blue Shield. 514 U.S. at 650. The surcharges were intended to, and did, " 'increase the cost of obtaining medical insurance through any source other than the Blues to a sufficient extent that [benefit plans] will switch their coverage to . . . the Blues.' " 514 U.S. at 652.[6] Although the District Court and Court of Appeals both held this economic impact on the costs incurred by ERISA plans a sufficient connection with ERISA plans to trigger preemption, this Court disagreed.

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so that *wherever* particular work is performed, the state or its agencies or municipalities is the ultimate customer.

[6] The 24 percent surcharge for hospital costs borne by some employee benefit plans as a result of the New York law at issue in *Travelers* is similar in size to the 25 percent increase in operating costs for some motor carriers on public works projects that is alleged here to result from the prevailing wage law.

The nature of the state laws Congress intended to pre-empt in enacting ERISA, this Court held in *Travelers*, cannot be determined based solely on the bare language of the ERISA preemption provision. For, "if 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.' " *Travelers*, 514 U.S. at 655 (citation omitted). *See also De Buono v. NYSA-ILA Medical & Clinical Services Fund*, 117 S.Ct. 1747, 1751 (1997) (" 'Applying the "relate to" provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.' ") (quoting *Dillingham*, 519 U.S. at 335 (Scalia, J., concurring)).

Accordingly, the *Travelers* Court concluded that "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 514 U.S. at 656 (citation omitted). And in doing so, *Travelers* concluded that given the wide range of state laws likely economically to affect the costs of providing benefits, the indirect economic impact of a state law on the choices made by plan officials is not in itself a sufficient connection with an ERISA plan to trigger preemption. 514 U.S. at 660-62; *see also Dillingham*, 519 U.S. at 334, *quoting Travelers*, 514 U.S. at 668.

Although this Court has not yet construed the preemption provision of the FAAA Act itself, it applied the identically worded preemption provision of the Airline Deregulation Act in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) and *American Airlines v. Wolens*, 513 U.S. 219 (1995). In both Airline Deregulation Act cases, the Court relied heavily upon cases construing the

similarly worded preemption provision in ERISA. *Wolens*, 513 U.S. at 223; *Morales*, 504 U.S. at 384. Because the FAAA Act preemption provision was modeled, in turn, on the Airline Deregulation Act preemption provision (*see* Pet. App. 10a-11a (discussing the FAAA Act's legislative history)), it follows that the same analogy to ERISA preemption should inform the construction of the FAAA Act's preemption provision as well.

b. Once petitioners' simplistic, already rejected contention about the meaning of "related to" is replaced, as it must be, by a focus on the precise impact of the prevailing wage law on motor carrier "prices, routes or services" in light of Congress' objectives in adopting the FAAA Act, petitioners' preemption argument collapses.

Congress' objective in the FAAA Act was to preempt existing state regulation of the intrastate transportation of property. The statute itself explains:

> Congress finds and declares that—(1) the regulation of intrastate transportation of property by the States has (A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers; and (2) certain aspects of the State regulatory process should be preempted. [FAAA Act § 601(a); 108 Stat. 1569, 1605 (1994).]

The FAAA Act Conference Report describes the nature of the state regulation Congress had in mind: "Typical forms of regulation include entry controls, tariffs filing requirements and price regulation, and types of commodities carried." H.R. Conf. Rep. No. 677, 103d Cong. 2d Sess. 86 (1994) ("Conf. Rep."), reprinted in 1994 U.S.C.C.A.N. 1676, 1759. The Conference Report also refers specifically to various state regulatory programs, such as the California Public Utilities Commission's regula-

tion of the trucking industry at issue in *Federal Express v. California Public Utilities Commission, supra.* Conf. Rep. at 87; 1994 U.S.C.C.A.N. at 1759. The 1994 House hearings that preceded adoption of the FAAA Act also focused on the effects of ~~these state~~ regulatory programs. *Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes and Services,* Hearing Before the Subcommittee on Surface Transportation of the Committee on Public Works and Transportation, House of Representatives, 103d Cong., 2d Sess. (1994).[7]

At the same time, nothing in the language of the FAAA Act or its legislative history suggests that it was Congress' purpose to preempt generally applicable state labor standards legislation, much less state public works prevailing wage laws.

Preemption of the prevailing wage law would intrude on a state's interest in its own procurement policies without furthering Congress' goal of eliminating state regulations of motor carriers that "impede[] the free flow of trade, traffic, and transportation of interstate commerce" and "place[] an unreasonable cost *on the American consumer* [ ]." FAAA Act, § 601(a)(1)(B), (C); 108 Stat. at 1605 (emphasis supplied). The prevailing wage law applies *only* to contractors who choose to undertake state public works contracts, and then *only* with respect to the wages of the employees actually performing work on those contracts. Contractors on purely private projects are left free to deal on whatever terms they choose.[8]

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[7] The sole case relied upon in the Petition that actually found a state law preempted by the FAAA Act involved just such a regulatory program. *See Central Transport, Inc. v. Michigin Public Service Commission, supra* (concerning the Michigan motor carrier act).

[8] The laws at issue in *Morales* and *Wolens* regulated how airlines marketed their services to the general public. In *Morales,*

Virtually *every* state procurement decision, moreover, can be said to have an effect on the "prices" or "services" of the contractors with which the state deals and the "prices" and "services" of their subcontractors. A generic contract for state deliveries that requires that deliveries be made within a certain number of days, for example, certainly affects the "services" provided to the state. If the FAAA Act preempted state regulations concerning the state's own procurement practices, on the reasoning that such regulation "relates to" motor carrier prices and services, then the state could not enter into any contracts involving motor carrier services at all.

Accepting petitioners' theory of preemption—*viz.* that the FAAA Act preempts state laws that raise motor carrier labor costs—also would result in invalidating a huge amount of general state employment legislation. For "[e]ven basic regulation of employment conditions will invariably affect the cost and price of services." *Travelers*, 514 U.S. at 660.

State laws govern the formation and nature of the employment relationship, the permissible terms of employment, and the manner in which the relationship may be terminated. Whether or not a motor carrier is liable for wrongful termination under state law for a discharge without just cause can certainly affect the carrier's labor costs,

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this Court held that the Airline Deregulation Act preempted state guidelines for the content and format of airline fare advertising. In *Wolens*, this Court held that the Airline Deregulation Act preempted the application of a state consumer fraud law, but not ordinary state contract law, to an airline's changes in its frequent flier program. Both cases differed from this one in that they involved state action that "related to" airline prices in the sense that the state action concerned the subject of airline fares. And both cases also differed from this one in that the state action concerned how the airlines compete for the *public*'s business, which is the competition Congress sought to foster.

for example, and therefore the prices charged. Similarly, much state legislation, including requirements for timely paychecks, pay for jury duty, non-forfeiture of vacation time, minimum wage laws, and disability and other non-discrimination in hiring and firing statutes, impose an economic cost on employers and consequently will affect their prices; a state requirement that janitors receive a lunch break and secretaries receive overtime pay will affect the labor costs of motor carriers along with those of other employers. In short, petitioners' labor cost pass-through argument regarding price impact would create for motor carriers a special exemption from state employment regulation that Congress could not have intended.

Petitioners' interpretation of the FAAA Act "related to" provision also would necessarily apply beyond employment regulation, encompassing within the preemption provision *every* state law with an indirect effect on motor carrier prices. Bridge and road tolls, sales taxes, property taxes, and general tort laws—including the decision whether to recognize comparative or contributory negligence, for example—can have an indirect, albeit substantial, economic impact on the prices charged by motor carriers.

The potentially broad sweep of this impact-based preemption analysis serves to refute that analysis. For, as this Court has emphasized, as the realm of state laws unconnected to the basic purpose of a federal enactment that would be preempted by that enactment grows, the conclusion that Congress intended to preempt them all becomes much less likely. *See Travelers*, 514 U.S. at 601 ("The bigger the package of [state] regulation with indirect effects that would fall on the respondents' reading of [ERISA's preemption provision], the less likely it is that federal regulation of benefit plans was intended to eliminate state regulation . . . .").

An intent to preempt therefore certainly cannot be said to be *clear and manifest*. *See Dillingham*, 519 U.S. at 334 (*quoting Travelers*, 514 U.S. at 668 (where a statute is " 'no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate' . . . [w]e could not hold preempted a state law in an area of traditional state regulation . . . without doing grave violence to our presumption that Congress intended nothing of the sort")).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

CALIFORNIANS FOR SAFE AND COMPETITIVE DUMP TRUCK TRANSPORTATION, LINDEMAN BROTHERS, INC., AND YUBA TRUCKING, INC.,

Petitioners,

v.

ROBERTA E. MENDONCA, LLOYD W. AUBRY, JR., JAMES W. VAN LOBEN SELS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF CALIFORNIA TRUCKING ASSOCIATION AND MICHIGAN CITIZENS ALLIED FOR RESPONSIBLE TRANSPORTATION AND SAFETY (M-CARTS) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE CALIFORNIA PREVAILING WAGE LAW, WHICH LAW SIGNIFICANTLY INCREASES THE COST OF SERVICE OF TRUCKING COMPANIES AND INTERFERES WITH THE MANNER OF SERVICE, HAS BEEN PREEMPTED BY THE FEDERAL STATUTE PROHIBITING STATE REGULATION OF TRUCK PRICES, ROUTES OR SERVICE?

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY CALIFORNIA TRUCKING ASSOCIATION (CTA) AND MICHIGAN CITIZENS ALLIED FOR RESPONSIBLE TRANSPORTATION AND SAFETY (M-CARTS) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The California Trucking Association (CTA) and the Michigan Citizens Allied for Responsible Transportation and Safety (M-CARTS) respectfully request this Court to grant them leave to file an Amicus Curiae brief in support of Petitioners' Petition for Writ of Certiorari.[1] This Motion is filed pursuant to Rule 37 of the Rules of the United States Supreme Court.

CTA is a trade association made up of California trucking companies and suppliers to the truck industry. M-CARTS is a trade association of trucking companies located in the state of Michigan, which was organized to present views on legal issues impacting the Michigan trucking industry. The issue presented in this case

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[1] Petitioners, Californians for a Safe and Competitive Dump Truck Transportation, Lindeman Brothers, Inc., and Yuba Trucking, Inc., as well as Respondents, International Brotherhood of Teamsters, AFL-CIO have consented to the filing of this brief. Roberta E. Mendonca, Lloyd W. Aubry, Jr., James W. Van Loben Sels, the California Department of Transportation, the California Department of Industrial Relations, and the California Division of Labor Standards Enforcement, California Department of Transportation, have not consented to the filing of this brief, necessitating a motion pursuant to Rule 37 of the Supreme Court Rules. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

directly impacts the members of CTA, involving as it does the continued enforceability of a California state statute impacting the trucking industry. The issue confronted by the proceeding further has a significant impact on the laws of other states, such as Michigan, and their continued validity in light of the sweeping federal preemption enacted by Congress as Section 601 of the Federal Aviation Administration Authorization Act of 1994, now codified at 49 U.S.C. § 14501(c)(1).

The continued enforcement and applicability of a patchwork of state laws directly affecting the routes and service provided by the trucking industry is directly contrary to the findings made by Congress and contained in the text itself of the 1994 legislation prohibiting state regulation of this industry. Congress found, in enacting Section 601, that state regulation of intrastate truck transportation had impeded the "free flow of trade, traffic and transportation of interstate commerce." This, Congress declared, "placed an unreasonable cost on the American consumers." *See* Section 601(a)(1) of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Tit. IV, 108 Stat. 1604. Congress modeled that preemption directly upon the preemption accomplished by it in the Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707.

This case is one of a series of cases which is interpreting the scope of those preemptions, as well as the impact of two recent pronouncements by this Court as to the scope of the preemption accomplished here. The issue in this case is of vital importance as it affects the trucking industry.

Given their membership and interests, the Amici believe that they can bring to the attention of the Court fresh and relevant matters.

Dated this 5th day of March, 1999.

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CALIFORNIA TRUCKING ASSOCIATION AND MICHIGAN CITIZENS ALLIED FOR RESPONSIBLE TRANSPORTATION AND SAFETY 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

I. THE F4A PREEMPTION OF STATE REGULATION OF LAWS RELATING TO PRICES, ROUTES, OR SERVICES WILL BE THWARTED, IF THE NINTH CIRCUIT DECISION IS ALLOWED TO STAND 3

II. THE CPWL IS RELATED TO PRICES, ROUTES, OR SERVICES 6

III. A SYSTEM OF FEDERAL LAWS AND REGULATIONS SHOULD BE APPLIED TO THE SERVICES OF THE TRUCKING INDUSTRY, NOT STATE LAWS 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77 (2d Cir. 1997) 8

Abdu-Brisson v. Delta Airlines, Inc., 927 F. Supp. 109 (S.D.N.Y. 1996) 9

Aloha Islandair, Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997) 9

Aloha Islandair, Inc. v. Tseu, Case No. 94-00937, 1995 WL 549319 (D. Hawaii, July 13, 1995) 9

American Airlines v. Wolens, 513 U.S. 219, 115 S. Ct. 817, 130 L.Ed.2d 715 (1995) 2, 3, 5

Belgard v. United Airlines, 857 P.2d 467 (Colo. Ct. App. 1992) 8, 9

Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998) 9

Federal Express Corp. v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992) 5

Fitzpatrick v. Simmons Airlines, Inc., 218 Mich. App. 678, 555 N.W.2d 479 (1996) 8, 9

Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir. 1997) 10

Gilman v. Northwest Airlines, Inc., 230 Mich. App. 293, 583 N.W.2d 536 (1998) 8

Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995) 10

TABLE OF AUTHORITIES – Continued

Page

In Re Federal Preemption of Provisions of the Motor Carrier Act, 223 Mich. App. 288, 566 N.W.2d 299 (1997), *leave to appeal denied*, 458 Mich. 852 (1998), *cert. denied*, 119 S. Ct. 544 6

Morales v. Trans World Airlines, 504 U.S. 374, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992).....2, 5

Parise v. Delta Airlines, Inc., 141 F.3d 1463 (11th Cir. 1998)..... 9

Parise v. Delta Airlines, Inc., Case No. 95-1149-CIV-ORL-22, 1997 WL 375296 9

Smith v. Comair, Incorporated, 134 F.3d 254 (4th Cir. 1998)..... 9

Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186 (3d Cir. 1998) 10

Wellons v. Northwest Airlines, Inc., 165 F.3d 493 (6th Cir. 1999) 7, 10

FEDERAL MATERIALS

Airline Deregulation Act of 1978 Pub. L. No. 95-405, 92 Stat. 1707.....2, 4, 5, 7

Federal Aviation Administration Authorization Act of 1994 Pub. L. No. 103-305, Tit. IV, 108 Stat. 1604 .....2, 3, 10, 11

INTEREST OF THE AMICI CALIFORNIA TRUCKING ASSOCIATION AND MICHIGAN CITIZENS ALLIED FOR RESPONSIBLE TRANSPORTATION AND SAFETY

The California Trucking Association (CTA) is a trade organization of California trucking companies and suppliers to the California trucking industry. CTA has among its membership a broad cross-section of trucking companies of various types and sizes serving the citizens and businesses of the State of California. Michigan Citizens Allied for Responsible Transportation and Safety (M-CARTS) is also a trade organization, made up of trucking companies located within the State of Michigan, specifically organized in 1988 to present positions on legal and statutory issues involving regulation of the trucking industry. The continued enforcement of California's prevailing wage law, at issue in this proceeding, directly affects the operations of CTA members. Further, as the enforceability of this law has relevance to similar statutes in other states, M-CARTS has a direct interest in the important issue involved in this proceeding.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth in the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

A Writ of Certiorari should issue from this Court to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit committed error, in ruling that the

Federal Aviation Administration Authorization Act of 1994 Pub. L. No. 103-305, Tit. IV 108 Stat. 1604 (F4A) did not preempt California's prevailing wage law (CPWL), as set forth in California Labor Code Sections 1770-80. The ambit of the federal preemption of state laws relating to price, routes, or service of trucking companies certainly encompasses the CPWL, the applicability of which raises truck rates by twenty-five percent, negatively impacts the routing of trucks, and limits service as well.

Congress explicitly declared, in the course of enactment of Section 601 of F4A in 1994, that it was modeling the truck preemption on the airline preemption enacted some sixteen years previously, in the Airline Deregulation Act of 1978 Pub. L. No. 95-405, 92 Stat. 1707 (ADA), as then recently interpreted by this Court in *Morales v. Trans World Airlines*, 504 U.S. 374, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992). Within weeks of the effective date of the truck preemption of January 1, 1995, this Court handed down another significant interpretation of the air preemption, in *American Airlines v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L.Ed.2d 715 (1995). This Court, in *Wolens*, held preempted by the ADA not a state economic regulatory statute, but rather a state consumer fraud and deceptive business practice statute, sought to be applied to airlines. Despite the fact that it was a law of general applicability, this Court found that such a statute related to the price, routes, or service of airlines and was accordingly preempted.

The same should hold true with respect to statutes such as the CPWL. Trucking companies should be subject to federal regulations with respect to their provision of service, and not a confusing and conflicting hodgepodge

of state laws and regulations. Only through such an interpretation can the true purpose of the motor preemption be accomplished – to eliminate the costly and confusing state interference with interstate commerce in the transportation industry.

The decision of the Ninth Circuit panel in *Mendonca* is directly contrary to this Court's precedent in *Wolens*. The importance of this issue as to the scope of the corresponding airline-motor carrier preemptions of Congress is demonstrated in the number of circuit courts recently addressing the scope of the preemption. The petition should be granted, so that this Court's interpretations in *Morales-Wolens* will be consistently applied to the motor carrier (and airline) industries.

I. THE F4A PREEMPTION OF STATE REGULATION OF LAWS RELATING TO PRICES, ROUTES, OR SERVICES WILL BE THWARTED, IF THE NINTH CIRCUIT DECISION IS ALLOWED TO STAND.

The Ninth Circuit analysis of the F4A preemption is fundamentally flawed. If that analysis is allowed to stand, it will significantly detract from the broad scope of the preemption intended to have been accomplished by Congress, directly contrary to its express intent. In the Ninth Circuit decision below, the court erred significantly in analyzing the legislative history of Section 601. It did so when it assumed that the federal preemption of state controls over the trucking industry did not affect those jurisdictions which did not engage in economic regulation of the trucking industry. Petitioners' Appendix A, p. 11A, 152 F.3d at 1187. The court below concluded that,

as seven of the jurisdictions which did not then engage in economic regulation of the trucking industry still possessed prevailing wage laws, then Congress could not have intended that prevailing wage laws such as the CPWL be preempted by Section 601.

In the congressional history, Congress outlined a particular problem. That problem may have been caused by what Congress viewed as historical economic regulatory statutes for the trucking industry. However, the panel ignored the fact that the remedy Congress adopted, i.e., utilizing the earlier language employed by it in the ADA, affects state laws in a much more sweeping fashion than merely those of traditional economic regulatory statutes. That this is true can be seen by examining *Wolens*. At issue in *Wolens* was a state consumer protection statute. Illinois, at the time of the passage of the ADA, did not regulate its intrastate airline industry from an economic standpoint.[2] Yet, the offending statute, a statute of general applicability to all businesses, was still offensive to the scope of the airline preemption, because it did affect the rates, routes, or service of an air carrier. Such a statute could not be enforced in the face of the federal preemption.

It is true, as the Ninth Circuit noted below, that the initial impetus for the truck preemption legislation in 1994 grew out of a concern about disparity in economic enforcement between air carriers and motor carriers, brought about by an earlier decision of the Ninth Circuit

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[2] Only three states (California, Florida and Texas) regulated intrastate airline transportation at the time of enactment of the ADA.

in *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992). However, the Ninth Circuit decision below failed to consider that the initial legislative proposal to preempt only the package delivery industry was significantly expanded by Congress to include the entire motor carrier industry, deliberately employing the same language in Section 601 that it had earlier utilized in the ADA. As Congress stated, it "did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*. . . . " H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess., at 83 (1994), reprinted in 1994 U.S.C.C.A.N. 677 at 1755.

It is true, in *Wolens*, that this Court, in interpreting the scope of the ADA preemption, ruled that routine breach of contract claims were not preempted. In doing so, however, the Court declared:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own self-imposed undertakings.

115 S. Ct. at 824. The CPWL, however, is a state-imposed obligation. The scope of the Section 601 preemption is substantially diluted through the decision of the Ninth Circuit below, if it is allowed to stand. A Writ should issue here to correct that error.

II. THE CPWL IS RELATED TO PRICES, ROUTES, OR SERVICES.

The Ninth Circuit below concluded that the effect of the CPWL was no more than "indirect, remote, and tenuous" on the prices, routes, and services of California motor carriers. Petitioners' Appendix, p. 15A, 152 F.3d at 1189. Accordingly, it held that the CPWL fell outside the parameters of the Section 601 preemption. This analysis is flawed as well. By dramatically interfering with the manner in which California motor carriers can provide truck services as well as impacting the prices which must be charged by those carriers in a momentous way, the CPWL is related to the prices, routes, and services charged by trucking companies.

A similar issue was addressed by the Michigan state courts, *In Re Federal Preemption of Provisions of the Motor Carrier Act*, 223 Mich. App. 288, 566 N.W.2d 299 (1997), *leave to appeal denied*, 458 Mich. 852 (1998), *cert. denied*, 119 S. Ct. 544. Because a provision of Michigan state law requires trucking companies to treat their drivers as employees, the Court found that the statute was " 'related to' the cost and ability of many motor carriers to provide their services in Michigan." 223 Mich. App. at 309. The Michigan provision mandated a type of relationship between a motor carrier and its drivers, thereby affecting routes and services and "most probably . . . prices." 223 Mich. App. at 309.

The CPWL in fact produces the acute economic effects that call for preemption. It directly affects competition, by mandating higher cost and thereby higher prices, as well as inducing carriers to rely on independent

contractors, as contrasted with employee drivers. This is just the sort of interference with the marketplace that Section 601 was designed to prevent. The Ninth Circuit decision on the "related to" aspect of the CPWL is erroneous also. A Writ should be granted in this respect as well.

III. A SYSTEM OF FEDERAL LAWS AND REGULATIONS SHOULD BE APPLIED TO THE SERVICES OF THE TRUCKING INDUSTRY, NOT STATE LAWS.

The decision of the Ninth Circuit below subjects carriers to a continued conflicting maze of state laws and regulations, vis-à-vis their workforce. The Writ should be granted to review whether federal or state regulations or both govern motor carrier services in light of the federal preemption.

That this issue is of profound importance to the transportation industry is reflected in the numerous recent cases concerning this very issue. This issue was addressed most recently in *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999). In *Wellons*, a sharply divided Sixth Circuit panel reversed the lower court and ruled that Michigan's Civil Rights Act was not preempted in an action brought by a former reservation clerk against an airline for race discrimination and related common law tort claims. In dissent, Judge Krupansky disagreed, stating that the ADA preemption represented a congressional judgment "to forestall all state regulation of commercial airlines and any and all particulars related to their prices, routes, and services, in favor of exclusive

federal regulation (accompanied by a large measure of overall deregulation). Because the employment relationship is, as a matter of law, inextricably connected to a business's provision of services to its customers, all non-contractual employment discrimination claims pressed by past, present, or potential future employees against commercial airlines must be solely anchored in federal law." 165 F.3d 504.

Disagreement among courts on this issue was demonstrated by two separate panels of the Michigan Court of Appeals, one of which held in *Fitzpatrick v. Simmons Airlines, Inc.*, 218 Mich. App. 678, 555 N.W.2d 479 (1996), that Michigan's Civil Rights Act was preempted by the ADA, in an action brought by an airline baggage handler against his former employer for discrimination based on his weight and another of which held in *Gilman v. Northwest Airlines, Inc.*, 230 Mich. App. 293, 583 N.W.2d 536 (1998), that the Michigan Civil Rights Act was not preempted, in an action by an airline account executive, alleging age and sex discrimination under the same civil rights act.[3]

Three other recent circuit court of appeals decisions have involved similar issues. In *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77 (2d Cir. 1997), the Second Circuit found New York's human rights law not preempted with respect to a series of age-discrimination claims, reversing

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[3] *See, also, Belgard v. United Airlines*, 857 P.2d 467 (Colo. Ct. App. 1992), in which another state court held preempted in an action by pilots under Colorado's Handicapped Discrimination Act.

the determination of the district court.[4] In *Aloha Islandair, Inc. v. Tseu*, 128 F.3d 1301 (9th Cir. 1997), the Ninth Circuit held not preempted Hawaii's disability discrimination provisions, reversing the judgment of the district court.[5] In *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463 (11th Cir. 1998), the Eleventh Circuit held not preempted Florida's civil rights law in an action brought by a former airline employee alleging age discrimination, reversing the district court dismissal of the action on preemption grounds.[6] In the latter case, the panel distinguished the decisions such as *Belgard* and *Fitzpatrick*, by noting that the preemption argument in *Parise* was premised on a defense offered by the airline, and not on the state law in which the claim was based. These cases demonstrate the differing approaches which are being taken by the courts on the ADA F4A preemption question as it specifically relates to states affecting the employment terms of carriers' employees.[7]

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[4] *See Abdu-Brisson v. Delta Airlines, Inc.*, 927 F. Supp. 109 (S.D.N.Y. 1996).

[5] *See Aloha Islandair, Inc. v. Tseu*, Case No. 94-00937, 1995 WL 549319 (D. Hawaii, July 13, 1995).

[6] *See Parise v. Delta Airlines, Inc.*, Case No. 95-1149-CIV-ORL-22, 1997 WL 375296.

[7] These difficulties present themselves in the tort context as well. *See Smith v. Comair, Incorporated*, 134 F.3d 254 (4th Cir. 1998), holding preempted certain breach of contract and intentional tort claims based on an airline's refusal to permit a passenger to board, and certain other claims not preempted; *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), holding actions arising out of an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage and other similar amenities not preempted and thereby

Of course, in this case, it is not necessary for the Court to rule that all state action is preempted by Section 601 of the F4A, the position advocated by Judge Krupansky in dissent in *Wellons, supra*. (*See* Petition, p. 17, fn. 16.) That is because the California CPWL has a startling and profound effect on motor carrier prices and services. The Writ should be granted in this case, because of the direct connection between the CPWL and prices, routes, and services. This case also presents the opportunity for this Court to underscore the primacy of the federal interest, in regulating transportation entities such as air and motor carriers. As these many cases demonstrate, the ramifications of the issue involved in this case are national in scope and extends to myriad situations. For this reason, the Writ should be granted.

CONCLUSION

The Ninth Circuit ignored the language of Congress in Section 601(a) of F4A itself, where Congress found that state regulation had impeded the free flow of commerce and placed unreasonable costs on American consumers. The Ninth Circuit ignored the legislative history of the F4A, where Congress laid out the map of *Morales* (and subsequently *Wolens*) for interpreting the scope of the

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expressly overruling *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995), and *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997); and *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998), finding a defamation and accompanying punitive damages claim brought by a travel agency against an airline not preempted.

motor carrier preemption. It also ignored the acute impact which the CPWL has on motor carrier prices, routes, and services. The federal method of regulation for a carrier's operations should be primary, under Section 601 of the F4A. The decision below represents an erosion of the preemption. A Writ of Certiorari should be granted by this Court to redress this erroneous conclusion in an area of vital significance not only to carriers in California, but in Michigan and throughout the United States.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

Californians for Safe and Competitive Dump Truck Transportation, Lindeman Brothers, Inc., and Yuba Trucking, Inc.,
Petitioners,

v.

Roberta E. Mendonca, Lloyd W. Aubry, Jr., James W. Van Loben Sels, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

May California impose on motor carriers an anticompetitive public policy, different from that existing elsewhere in the nation, when the policy increases prices by 25%, disrupts service markedly, and directly interferes with the routing of trucks and employees in contravention of deregulation mandated by 49 U.S.C. Section 14501(c)(1)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENTS IN REPLY 1

1. The Decision Below Merits Review Under Criteria Utilized by This Court 1

2. The Decision Below, A Case Of First Impression, Articulates An Inappropriate Standard For FAAA Act Preemption 2

3. The Challenged State Action Is "Regulation" Subject To FAAA Act Preemption 3

4. This Court's Opinion In Travelers Is Not Dispositive 3

5. FAAA Act Preemption Is Not Limited To State Public Utility Regulation 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) 1, 2

Associated General Contractors of
America v. Metropolitan Water District,
159 F.3d 1178, 1184 (9th Cir. 1998) 4

Dillingham Construction v. County of Sonoma,
57 F.3d 712 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 316 (1997) 4

Federal Express Corp. v.
California Public Utilities Commission,
936 F.2d 1075 (9th Cir. 1991) *cert. denied,*
504 U.S. 979 (1992) 1, 7

Hydrostorage, Inc. v. Northern California
Boilermakers, Local Joint Apprenticeship
Commission, 891 F.2d 719 (9th Cir. 1989)
cert. denied, 498 U.S. 822 (1990) 4

Lusardi Construction Company v. Aubry,
1 Cal.4th 976, 986-988, (1992) 4

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 1, 7, 8

New York Conference of Blue Cross v.
Travelers Ins. Co.,
514 U.S. 645 (1995) 6, 7

NL Industries v. Kaplan,
792 F.2d 896 (9th Cir. 1986) 3

Statutes

California Labor Code §1772 5

ARGUMENTS IN REPLY

Responding to the arguments advanced by the Respondents in this matter, Petitioners respectfully submit:

1. The Decision Below Merits Review Under Criteria Utilized By This Court.

First, the Decision below decides an important federal question in a way which conflicts with the relevant opinions of this Court. The Decision simply cannot be reconciled with Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) and American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) as more fully explained in the Petition herein and by the *amici curiae*. It is directly contrary to decisions interpreting the Airline Deregulation Act ("ADA") expressly adopted by Congress in enacting the FAAA Act. *See*, Petitioners' discussion of Federal Express v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991) *cert. denied*, 504 U.S. 979 (1992).

Second, the Decision below decides an important question of federal law, which has not been, but should be, settled by this Court. More specifically, the question of whether the FAAA Act preempts a State prevailing wage statute ("CPWL") which indisputably impacts the rates, routes and services of motor carriers[1], has not previously been

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[1] CPWL mandates an artificially inflated wage specifically for truckers. Contrary to the assertion of Respondents that CPWL outlaws a "substandard" wage, in fact, it forces carriers to pay wages which are 75% higher than dictated by the marketplace or alternatively, to utilize independent owner-operators. California's mandated policy offends the admonition of this Court in Wolens, to wit, "the ban on enacting or enforcing any law 'relating to rates, routes, or services' is

decided by this or any court.

Third, the Decision below departs from the accepted and usual course of judicial proceedings in such a manner as to call for an exercise of this Court's supervisory power. More specifically, the Decision below stands for the proposition that judges are not required to apply the economic litmus test for FAAA Act preemption announced by Congress; rather they may disregard the facts and approve State regulatory schemes which suit their personal fancy, even while acknowledging that the State scheme impacts motor carrier prices, routes and services. The net result is to substitute the judgment of the judiciary for that of Congress.

2. The Decision Below, A Case Of First Impression, Articulates An Inappropriate Standard For FAAA Act Preemption.

As the first reported case of real significance with respect to FAAA Act preemption, the Decision below limits Congress's "overarching deregulatory purpose" by concluding that the admitted effect of CPWL is "indirect, remote and tenuous" and therefore not preempted. Notably, the court reaches this conclusion without any evaluation of the undisputed facts. In so doing, the opinion establishes an obtuse, amorphous and unworkable standard with respect to the review of State action affecting prices, routes and services of motor carriers.

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most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" Wolens, *supra*, 513 U.S. at 229, n. 5.

In defending the court's approach, Respondents claim that Petitioners "exaggerate" the effect of prevailing wage law on motor carriers.[2] However, like the court, Respondents neglect to advise that the judgment below rested on a motion to dismiss. As such, all material allegations in the Complaint (including those which Respondents incorrectly claim are exaggerated) must be taken as true and construed in the light most favorable to Petitioners. *See,* NL Industries v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

Given the unique procedural context of this case and the undisputed dramatic impact of CPWL on the motor carrier operations of Petitioners, the legal principle adopted by the court below, disconnected as it is from any factual evaluation, guts Congress's simple deregulatory objective set forth in the plain language of the statute and its no nonsense legislative history.

3. The Challenged State Action Is "Regulation" Subject To FAAA Act Preemption.

Respondents assert that CPWL is not preempted because as to public works projects, California is the "ultimate consumer" willing to pay the price of an artificially inflated wage, and further, that as part of its procurement policies, California must be free to contract with whom it

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[2] Respondents also argue that by preempting CPWL the Court will eradicate State employment regulation and "*every*" State law with an indirect effect on motor carrier prices. This is simply not so. *See*, fn. 16 of the Petition herein.

pleases subject to any restrictions it wishes to impose.[3]

First, these arguments rightly have been rejected by the courts. CPWL is not exempt from preemption on the theory that the State is acting as a market participant or in its proprietary function. Under CPWL:

> California . . . is not acting merely as a "market participant" rather than a regulator. The state's involvement does not end with the awarding of the contract. [Calif. Lab. Code] Section 1777.5 is aimed at regulating contractors who work on public contracts. The Division, part of a state agency, monitors and enforces violations of section 1777.5. This amounts to regulation, not merely "market participation".

Hydrostorage, Inc. v. Northern California Boilermakers, Local Joint Apprenticeship Commission, 891 F.2d 719, 730 (9th Cir. 1989) *cert. denied*, 498 U.S. 822 (1990). *See also,* Associated General Contractors of America v. Metropolitan Water District, 159 F.3d 1178, 1184 (9th Cir. 1998); Dillingham Construction v. County of Sonoma, 57 F.3d 712,

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[3] Respondents fail to tell the Court that California does not contract directly with the Petitioning motor carriers, but rather imposes CPWL on their operations by and through State law. *See also*, fn. 4, *infra*.

9th Cir. 1995) *rev'd on other grounds*, 519 U.S. 316 (1997).[4]

Second, by urging this Court to focus on the State as a willing "ultimate consumer," Respondents distort the proper focus of FAAA Act preemption, which requires an analysis of the effect of State regulation on motor carriers. In enacting the FAAA Act, Congress sought to unleash the creative energies of carriers by permitting service options to be dictated by the marketplace, not State mandated "policies." CPWL compromises these goals to the greatest imaginable extent. The majority of the business of Petitioning motor carriers (dump truck carriers) is on public works projects (*e.g.*, building highways). By altering the fundamental economics of the biggest portion of their business, CPWL radically impacts all remaining carrier activities. Thus a motor carrier simply cannot base its pricing on CPWL for fear of losing the business to a carrier who uses independent owner-operators (not subject to CPWL); nor can a motor carrier afford not to compete for the business of shippers engaged on public works projects. The resultant impact on all other shippers and the distortion of the competitive landscape in general are enormous. This Congress could not have

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[4] The California Supreme Court reached a similar conclusion in Lusardi Construction Company v. Aubry, 1 Cal.4th 976, 986-988 (1992), by recognizing that the obligation of a contractor on a public works project to pay the prevailing wage flows from the statutory duty imposed by CPWL and not exclusively from an independent contractual requirement. Furthermore, CPWL applies whether the work is performed by a contractor or subcontractor and whether or not the contractor or subcontractor has knowledge of the CPWL aspect of the contract. *See, Ibid*; Calif. Lab. Code Section 1772.

intended to permit.[5]

4. This Court's Opinion In Travelers Is Not Dispositive.

Respondents advance the argument that this Court has already rejected Petitioners' case in N.Y. Conference of Blue Cross v. Travelers Insurance Company, 514 U.S. 645 (1995), interpreting ERISA preemption, because there the Court permitted a 24% increase in hospital costs. They aver that this is similar in magnitude to the 25% increase in motor carrier "costs" [sic] in this case. Respondents' argument is wrong.

First, Travelers dealt with a 24% increase in minor hospital costs. By contrast, CPWL increases motor carrier wage *costs* by 75% resulting in an overall increase in *price* of 25%. Unlike the costs surcharged in Travelers, the wages increased by CPWL comprise a huge portion of overall carrier costs (as much as 40%). Factually, there is simply no comparison between the two cases, which an evaluation by the court of the facts would have made crystal clear.

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[5] In their opposition at footnote 5, Respondents express confusion over the relevance of CPWL's peculiar application to transportation over California's highways. Federal prevailing wage law applies *only* to activities "on the site" of the public work. By the FAAA Act, Congress sought to eliminate the patchwork of State regulation in existence at the time of the enactment of the FAAA Act. "The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." App. F to Petition at 50a. In establishing different requirements for motor carriers operating in California than existing elsewhere in the nation, CPWL perpetuates the patchwork of State regulation Congress sought to eliminate.

Second, in enacting ERISA preemption, Congress was not concerned with indirect economic influences. "[C]ost-uniformity was almost certainly not an object of [ERISA] pre-emption . . ."; nor was indirect economic regulation which "simply bears on the costs of benefits." Travelers, *supra*, 514 U.S. at 659-660. By contrast in enacting the FAAA Act, Congress explicitly sought to eliminate State economic regulation of motor carriers which "increased costs." App. F to Petition at 50a.[6] Thus, on balanced review, this Court cannot be said to have determined in Travelers, or otherwise, that CPWL does not offend the FAAA Act in the manner and to the prohibited extent asserted by Petitioners.

5. FAAA Act Preemption Is Not Limited To State Public Utility Regulation.

Finally, Respondents urge that Congress only intended to preempt typical forms of public utilities regulation. This argument has been rejected by this Court in Morales:

> This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the states to "*regulate* rates, routes, and services".

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[6] *See also*, Federal Express, *supra*, 936 F. 2d at 1078: "Regulations which are not patently economic . . . relate to the terms on which the . . . carrier offers its services. Terms of service determine cost. To regulate them is to effect the price. The terms of service are as much protected from state intrusion as are . . . rates."

Morales, *supra*, 504 U.S. at 384. There, this Court specifically held that laws of general applicability were also preempted by the FAAA Act. *Id.* at 385-6.

In addition, the position advanced by Respondents is inconsistent with the pronouncements of Congress that it did "not intend for States to attempt to *de facto* regulate, prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." App. F to Petition at 48a.

CONCLUSION

A Writ of Certiorari should issue.

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